CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

DECEMBER TERM, 1859

JOHN BEASLEY ET AL. v. THOMAS KNOX, ADMINISTRATOR.

Where a legacy is payable out of a fund, consisting of bonds and notes, drawing interest, and the legatee refuses to take the securities themselves, he is, nevertheless, entitled to interest from the death of the testator, but on account of his refusal to take the notes, he shall not recover his costs in a suit for such interest.

CAUSE removed from the Court of Equity of WASHINGTON.

John B. Beasley died on the ..... day of January, 1856, having made and published his last will and testament, the first and second clauses of which are as follows, viz.:

"First of all, I give and bequeath to my son John Beasley $5,000 out of the bonds and money that may be on hand at my death, to be paid by my executors without charge of commissions.

"Second. I give and bequeath to my son Joseph $4,000, in like (2) manner as above expressed, as well as what I have already given him, making in all $5,000, without charge by my executors of commissions."

There was a residuary clause giving the remainder of his estate to his wife's younger children.

This will being admitted to probate, at February Term, 1856 (the executors therein nominated having died in the lifetime of the testator), the defendant was appointed administrator, with the will annexed, at that term, and entered upon the discharge of the duties of the office. There was no money on hand at the death of the testator, but he left

notes and bonds on hand to the amount of $15,000. These the defendant proceeded to collect with all convenient speed, and out of the moneys thus arising he paid the debts of the estate to the amount of some $8,000, and has since paid off both the legacies given to John and Joseph, with interest thereupon, from the end of two years after he qualified as administrator, but refused to pay interest for any greater period.

The bill is brought for an account and the recovery of the interest thereon from the date of the testator's death.

The defendant, shortly after he qualified, offered the plaintiffs payment of their legacies out of any bonds or notes on hand that they might select, which they declined, and insisted on the payment in money.

The administrator made one payment to John in 1857, and the remainder of what he insists was done on 30 July, 1859, but refused to pay interest from the death of the testator, from January, 1856, to February, 1858. He says, in his answer, that he could not consistently with his duties to the creditors make these payments earlier. The main question in the case is whether these legacies were entitled to bear interest from the death of the testator.

The cause was set down for hearing on bill and answer and exhibit, and sent to this Court.

(3) *H. A. Gilliam for plaintiffs.*
Hines for defendant.

PEARSON, C. J. Where the will fixes no time for the payment of legacies, they are payable forthwith, and unless the condition of the estate requires delay, it is the duty of an executor to assent to specific legacies and to pay pecuniary legacies as soon as funds are in hand.

"The statute allows executors and administrators two years to settle estates, on the supposition that many estates are complicated and cannot well be settled in less time; this, however, was by no means intended to confer on the residuary legatee the right to have the fund put out at interest for his benefit." *Turnage v. Turnage,* 42 N. C., 127. According to the principles established by that case, in the absence of any direction in the will, if a slave, for instance, is bequeathed, the executor should assent forthwith, or, if he should deem it prudent to withhold his assent and hires the slave, when he does assent, the legatee will be entitled to receive the amount of the hire. So, if a note drawing interest is bequeathed, and the executor retains it to see how the estate will turn out, the legatee is entitled to the interest as well as the note, for the amount of the hire or of the interest certainly does not belong to the executor, nor has the residuary legatee any right to it;

and where it appears that the delay, although prudent, was not necessary, the specific legatee is entitled to be put in the same condition as if it had not occurred, under the maxim, "equity considers that done which ought to have been done," which is effected by considering the executor as having acted as a trustee for such legatee.

In our case, as there was no money on hand, the defendant was right when he offered to pay the legacies in bonds, and the plaintiffs were mistaken in supposing that they were entitled to have the amount of their legacies in money; but still, as the bonds were drawing interest, the defendant was bound, when he afterwards paid the money, to account for the interest which he had received, because the accu- (4) mulation could not inure to his benefit, nor to that of the residuary legatees.

There will be a decree for the plaintiffs, but without costs, as their refusal to accept the bonds was the original cause of the litigation.

PER CURIAM. Decree accordingly.

Cited: Harrell v. Davenport, post, 9; *McWilliams v. Falcon,* 59 N. C., 237.

HENRY HARRELL, EXECUTOR, v. POLLY DAVENPORT ET ALS.

1. A widow who dissents from her husband's will has no right to insist that certain slaves, who had committed a felony and were afterwards hanged, should be valued as though they were free from such criminal charge, it being *Held* by the court that slaves so circumstanced were of no value.

2. It is the duty of the executor taking charge of slaves accused of a felony to have them defended, and the expense of defending such as were convicted and executed was *Held* to be a charge upon the estate and not upon the legatees for whom they were intended; but as to one who was acquitted and received by a legatee, it was *Held* that the charge for his defense should fall upon the legatee.

3. A bequest of a residuary fund to A. and B., who are to "share equally with the children of C.," was *Held* to give to each of the children of C. a share equal to the respective shares of A. and B. The general rule as to interest upon general legacies is that none can be calculated before the time appointed for their payment.

4. The legatees of slaves specifically bequeathed are entitled to their hires from the death of the testator.

CAUSE removed from the Court of Equity of WASHINGTON.

William D. Davenport was shot and killed by two of his slaves, Ganza and Aaron, in the month of February, 1858. The two slaves aforesaid

were tried and convicted of the offense and afterwards executed. Another slave, George, was also put upon his trial for the same offense, but was acquitted. In the will of the said William D. Davenport, George
(5) is given to the children of William H. Davenport, Ganza to Henry Harrel, who is the executor and plaintiff in this suit, and to his wife Catharine, and Aaron to the children of Samuel W. Davenport. On the arraignment of these slaves, the family of the testator and the public were greatly incensed against them, and no counsel having been secured for them, his Honor who tried the case ordered the plaintiff Harrell to have them defended in the best manner, and to pay the amount necessary to that end out of the estate of the testator, in consequence of which considerable sums were paid out by the executor in counsel fees and other expenses. After the acquittal of George, he was delivered by the executor to the children of W. H. Davenport, and sold by them, and the money divided among them.

The widow of the said W. D. Davenport dissented from his will and claimed her dower and distributive share.

This bill is filed by Harrell as executor, praying the advice of this Court on several questions growing out of the will of the said Davenport and the circumstances subsequently occurring. He states, among other difficulties presenting themselves:

1. That Polly Davenport, the widow, insists that in having her share assigned, she is entitled to have the value of Ganza and Aaron brought in as if they had not been convicted and hung. It is agreed that the apparent value of each of these slaves was $1,200 at the testator's death. She also insists that she is to have her share from the estate without any diminution for the expenses. These demands are opposed by the other legatees.

2. The legatees to whom Ganza and Aaron were bequeathed insist that their value shall be made good to them out of the estate.

3. The legatees of the slaves George, Ganza, and Aaron insist that the expenses of defending them shall be paid out of the estate, while it is insisted on the other side that each of the persons to whom these slaves were bequeathed shall bear the burdens incident to their protection.

4. By clause 13 of his will, the testator gives the residue of his
(6) estate, after many legacies, as follows: "My wife, Polly Davenport, and my children, Chloe Davenport, Catharine Harrell, and Alfred Davenport, each to take one share; to the children of Samuel W. Davenport, one share between them; to Mary Amanda Spruill and Mary Ann Ward, to share equally with each of the children of W. H. Davenport." It was insisted by the first named of these legatees, Mary Amanda Spruill and Mary Ann Ward, that by the words and meaning of this bequest they are to take a third each of the share herein given,

and that the children of W. H. Davenport, of whom there are five, take a third among them.

5. The fifth inquiry is stated in the preceding.

6. By the said will, the sum of $800 is given to Mary Ann Ward when she arrives at the age of 21. She is now about 16 years old, and contends for interest on the sum bequeathed from the testator's death, which claim is resisted by the others.

7. As soon as the said Harrell qualified as executor he hired out for the remainder of the year all the negroes of the estate except the three in jail, and at the end of the year he delivered them to the legatees to whom they were specifically bequeathed. The executor inquires how, in arriving at the amount of the distributive share of the widow, these slaves are to be valued, and as of what time?

8. The owners of the last mentioned slaves claim their accruing hires as incident to the property itself, which is resisted by the claimants of the residue.

On the foregoing points, the executor says that he is threatened with litigation, and calls upon the several parties to litigate these matters in the court of equity, and he prays that he may be protected from these adversary claimants by a decree. He submits to all proper accounts, etc.

The legatees who are brought in as defendants by this bill answer and insist upon the several views attributed to them in the plaintiff's bill.

The cause was set for hearing upon the bill, answers, and exhibits, and transmitted to this Court. (7)

Winston, Jr., for plaintiff.
H. A. Gilliam for defendant.

BATTLE, J. The executors of William D. Davenport, having met with difficulties in the settlement of the estate of their testator arising from the conflicting claims of the legatees named in his will among themselves, and also between them and the widow, who dissented from it, have filed this bill for the purpose of obtaining the advice of the Court upon certain questions which are therein stated. In the argument here, the counsel have conceded that only two or three of these inquiries admit of much doubt, and our attention, therefore, will be directed mainly to them.

1. The widow having dissented from the will, claims that in ascertaining the share of the personal estate to which she is entitled, she has the right to have the slaves Ganza and Aaron, who were prosecuted, convicted, and hung for murdering her husband, valued as if they had not committed any felony by which their lives were forfeited. This claim is ungracious and unfounded. Those slaves were, in fact, of no value—just as if they had had the smallpox or any other mortal dis-

ease at the death of the testator, and had died thereof soon after. This proposition is so plain that it does not admit of further elucidation by argument.

She also claims to have her share exempt from any costs attending the prosecution and defense of those slaves, and also of the slave George, who was acquitted. We will dispose of this question in connection with the third, in which the legatees of these slaves, respectively, claim to have the costs above stated paid out of the general assets of the estate, while the widow and the other legatees contend that the costs of the prosecution and defense of each of these slaves ought to fall on the legatee to whom he is given by the will. As to the slaves Ganza and Aaron, they were never accepted by the persons to whom they
(8) were respectively bequeathed—they formed a part of the estate of the testator, and it was the duty of the executor to take care of them and have them properly defended, and, we think, the necessary costs and expenses of such defense must be borne by the general assets of the estate. The case of George was different; he was received by the legatees to whom he was bequeathed, and sold by them. They took him *cum onere,* and of course must pay the costs of his defense.

The bequests of the slaves Ganza and Aaron were specific, and of course the loss of them by hanging must fall on the persons to whom they were respectively given, just as if the slaves had died a natural death.

3. The third question has been already answered in our opinion upon the latter part of the first.

4 and 5. The fourth and fifth questions may be considered together. The language of the thirteenth clause is too explicit to admit of any doubt that the division between the legatees, Mary Amanda Spruill, Mary Ann Ward, and the children of William H. Davenport, is to be per capita. The will says expressly that Mary Amanda Spruill and Mary Ann Ward are "to share equally with each of the children of William H. Davenport." How sharing equally with each can be construed to mean with all we cannot conceive. The consequence is that Mary Ann. Spruill and Mary A. Ward and W. H. Davenport's children divide one share equally between them.

6. The legatee Mary Ann Ward claims interest on her legacy of $800 from the death of the testator, and her counsel argues strenuously that she is entitled to it. We think otherwise. The general rule is that when the time for the payment of a general legacy is fixed by the testator, it will not carry interest before that time. 2 Roper Leg., 190, chap. 20, sec. 3. There is an admitted exception in the case of such a legacy to a child, or to one to whom the testator stands *in loco parentis,* who is otherwise unprovided for. 2 Roper Leg., 192, chap. 20, sec. 4. This

exception is not made in favor of a grandchild of the testator un- (9) less he stands *in loco parentis* to the legatee. See 2 Rop. Leg., 202, chap. 20, sec. 5, and the cases there cited. There is nothing in the present will or in the facts stated in the pleadings to show that the testator undertook to provide for the legatee as if she were his own child. It is mentioned as a fact that her mother was dead, but nothing is said of her father, or whether he had made any provision for her. The testator does not call the legacy a portion, as was done in *Acherly v. Vernon,* 1 Peere Williams, 783, nor use any other expression to show that he had placed himself in the stead of the father of the legatee. The general rule, therefore, must prevail, and no interest can accrue on the legacy until it shall become due.

7 and 8. The legatees of the slaves, respectively, are entitled to their hires from the death of the testator. These legacies being specific, the legatees take them, upon the assent of the executor, with the profits which they have produced, just as they would be entitled to the interest on bonds given specifically. See *Beasley v. Knox, ante,* 1. In ascertaining the shares to which the widow is entitled, these slaves must be valued as of the time of the settlement of the estate. *Hunter v. Husted,* 45 N. C., 97.

The parties may have a decree upon the principles herein stated. The costs must be paid out of the general assets of the estate.

PER CURIAM. Decree accordingly.

Cited: Swann v. Swann, post, 300; *Scales v. Scales,* 59 N. C., 166; *Ballantyne v. Turner, id.,* 228; *Chambers v. Reid, id.,* 305; *Culp v. Lee,* 109 N. C., 677.

(10)

DANIEL LITTLE ET ALS. v. ARCHIBALD BUIE ET ALS.

1. Half brothers and sisters not of the blood of the purchasing ancestor, cannot take under the statute of descents; where, therefore, one died seized of land descended through his mother from her father, and left no issue, nor brother, nor sister, except half sisters not of his mother's blood, it was *Held* that the father, surviving, took the inheritance. Rev. Code, ch. 38, sec. 6.

2. Where a bill has parties plaintiff having no interest in the questions set forth, the objection may be taken by demurrer.

APPEAL from the Court of equity of ROBESON.

The bill was filed by Daniel Little and his children, Margaret Ann Virginia Little, Mary Caroline Little, and Eliza Jane Little, alleging that they are tenants in common with the defendants of a large body of land which descended to the defendants and Rebecca, the wife of the

plaintiff Daniel, from her father, Daniel Buie. The bill further alleges that after the death of Daniel Buie, plaintiff's wife, Rebecca, had one son, Daniel B. Little, and died; that the plaintiff then intermarried with one Mary Evans, by whom he had one daughter, the plaintiff Margaret Ann Virginia; that after this Daniel B. Little died in 1858, unmarried and without issue; and within a month of his death the other plaintiff, Mary Caroline and Eliza Jane, were born to the said Daniel Little and his wife Mary. The bill sets forth that the plaintiff Daniel is entitled to an estate by the curtesy in the land in question, and that the other plaintiffs, the half sisters of the said Daniel B. Little, are entitled to the reversion in fee. The prayer is for a partition. To this bill the defendants demurred.

The cause was set down to be argued on the demurrer, and on argument, the court below sustained the demurrer, from which the plaintiffs appealed.

W. McL. Kay for plaintiffs.
Person and Strange for defendants.

(11) MANLY, J. It is clear, upon the authority of *McMichal v. Moore,* 56 N. C., 471, that the father, upon the death of his son, took his entire interest in the land in question, and the half sisters, not being of the blood of the transmitting ancestor, took nothing. In making, therefore, the sisters parties complainant, there has been a misjoinder, for which defendants may demur. (See Story Eq. Pl. S., 544, and the cases there cited.)

The order below is affirmed, the demurrer is sustained, and the bill dismissed without prejudice, but at the plaintiff's costs.

PER CURIAM. Decree accordingly.

Cited: Paul v. Carter, 153 N. C., 28; *Watson v. Sullivan, ib.,* 248; *Noble v. Williams,* 167 N. C., 113.

ROBERT F. MURPHY v. WILEY B. JACKSON AND RICHARD WARREN.

1. One creditor secured in a deed of trust cannot maintain a bill for an account of the fund without making all creditors who are preferred, and all in the same class with him, parties either plaintiffs or defendants.

2. Where a surety seeks to have his debt paid to the creditor out of some specified fund, or by some other party than himself, such creditor is a necessary party to the bill.

3. *Aliter,* where he has paid the debt and is seeking to be reimbursed by the principal or cosurety.

4. Where a bill alleged a fraudulent combination between the maker of a deed of trust and one of the trustees therein named, and it was sought to set aside a preference given to such trustee, it was *Held* that the trustor, as well as the trustee, should have been made a party.

CAUSE removed from the Court of Equity of CUMBERLAND.

The bill alleges that in 1854 one Matthew Sirmans executed to the defendants Jackson and Warren a deed of trust of certain property therein mentioned, consisting of a stock of goods, household furniture, a wagon, and certain debts and accounts due the said Matthew, in trust: First, to discharge a debt of about $90 due the estate (12) of Henry Dawson, whereon Randall Jackson and the defendant Warren were sureties. Then a debt of owing by Sirmans to the said defendant Richard Warren. Then to discharge two notes of $500 each, due to N. K. McDuffie. Then to pay a certain note of $700, due by Sirmans to Blaney Williams, or so much as would save the plaintiff harmless, he being one of the sureties thereon.

The bill further alleges that the two notes of $500 were originally due to a copartnership consisting of said McDuffie and one Upchurch, and that on a settlement between them the notes in question fell to the share of McDuffie, and that he endorsed them to the plaintiff, and that Sirmans paid all of one of these notes but $176, and that there is about $676 due plaintiff on the two.

The bill further alleges that the debt provided for in the second instance in said deed of trust had no existence in fact, but was feigned and covinous.

The bill further charges that after the trustees took possession of the goods conveyed, they permitted Sirmans to use and appropriate as much of them as he desired.

The bill further charges that the provision in the said deed to secure him against loss on the debt due Blaney Williams has not been complied with, but that plaintiff has been sued on the same and a judgment obtained, and that the plaintiff will have at least half of the debt to pay, there being one other surety.

The prayer is that "a decree be made in favor of the plaintiff for $676.04, with interest and costs and charges, and for so much as will save him harmless where he is surety for said Sirmans."

The defendants, in their answer, state that the $500 secured to Warren in the deed of trust is not fraudulent; that the latter had become the surety for Sirmans in sundry instances to the amount of that sum, and that it becoming manifest he should have to pay these debts, it was agreed that he should be considered as a creditor to that (13) amount and be indemnified in this provision.

Nothing is said in the answer as to the two notes of $500 due to N. K. McDuffie, or the endorsement to the plaintiff, except that, having paid the preferred debts, there was nothing in their hands to pay them, or any part of them.

The defendants further say that the plaintiff, previously to the filing of this bill and previously to the judgment on Blaney Williams' note, became insolvent and left the State; that he paid nothing on that debt, but that it was satisfied by the sale of the property of one Dougald McPhail, who was cosurety with him.

The defendants insist that all the creditors who are preferred in the assignment made by Sirmans, as also those sought to be postponed by this bill, to wit, N. K. McDuffie, Randall Jackson, and one James Harven, ought to have been made parties, and they ask the same advantage as if they had demurred. They deny all combination, etc.

The cause was set down to be heard on the bill and answer.

W. McL. McKay for plaintiff.
Neill McKay and Fowle for defendants.

PEARSON, C. J. The bill is badly drawn, and the cause being set for hearing on "bill and answer," the case fails, as well in regard to the *probata* as the *allegata*. It is defective in form and substance. In short, the plaintiff cannot have the relief asked for without departing from so many of the established modes of proceeding in courts of equity and violating so many clear principles that we feel at a loss which ground to select as the basis of the decree dismissing the bill.

The plaintiff seeks for an account of a fund which the defendants either have or ought to have received as trustees, under a deed executed by one Sirmans, and alleges that he is entitled to have one of the debts therein enumerated paid to him, and to be exonerated in respect to another, and also charges that the deed was made by Sirmans
(14) with an intent to defraud creditors, for that a supposed debt of $500 secured to the defendant Warren, who is one of the trustees, is feigned and covinous.

1. The allegation that two notes of $500 each, set out in the deed as payable to N. K. McDuffie, became the individual property of the said McDuffie in the settlement of the copartnership of McDuffie and one N. S. Upchurch, and were endorsed by McDuffie to the plaintiff, is not admitted in the answer, and there is no proof in respect to it; so this part of the bill fails, and not only so, but the failure causes a fatal defect for the want of parties, for these two debts are to be paid before the debt in which the plaintiff is concerned as a surety, and consequently McDuffie and Upchurch were necessary parties. It is well settled that

one creditor secured in a deed of trust cannot maintain a bill for an account of the fund without making all creditors, who are preferred, and all who are in the same class with him parties, either as plaintiffs or defendants. *Patton v. Bencini,* 41 N. C., 204; *Fisher v. Worth,* 45 N. C., 63. It is necessary to enforce this rule to prevent a multiplicity of suits, for otherwise the trustee might be subjected to as many suits as there are creditors; and to protect the trustee for an account taken in the suit of one would not be evidence in the suit of another creditor, and so the trustee could never know when he was safe.

2. Where a surety has paid the debt of his principal he may proceed against him, or may subject a fund which he has provided without making the creditor a party; but where the debt is unpaid and the surety seeks for exoneration, there, as a matter of course, the creditor must be a party, for the relief is not to have the amount paid to the surety, but to have it paid to the creditor, who is decreed to accept it in discharge of the liability. Our case furnishes an apt illustration of the principle. Sirmans is indebted to one Blaney Williams, with the plaintiff and one McPhail as his sureties. A fund is provided by Sirmans for the payment of the debt, or a sufficient amount thereof to save the plaintiff harmless; the plaintiff is insolvent and has left the country. Now, is the fund to be paid to him or to Williams? (15) Indeed, he hardly has the face to ask for the money, but prays for something like it, in the shape of a decree, for so much as will save him harmless in respect to his suretyship, when he does not allege that he has paid, or ever expects to pay, one cent! It is averred in the answer that the whole debt has been paid by a sale of the property of McPhail. If so, he is entitled to be subrogated to the rights of the creditor, and ought to have been a party on account of the interest which he has in the fund.

How far a creditor is at liberty to ask to have a deed of trust carried into execution which he alleges was made with an intent to defraud creditors, whether he can claim under, and also against it, is a question into which we will not now enter, for, as a fraudulent combination is charged between the debtor and one of the trustees, it would seem both parties to the alleged fraud should be before the court. But Sirmans is a necessary party on another ground—he is charged with having retained a large part of the trust fund, and it is admitted in the bill that he made a payment of several hundred dollars on one of the notes secured in the trust, to wit, the note payable to McDuffie after the creation of the trust. So he is a necessary party in taking the account, both in regard to items of charge and discharge.

PER CURIAM. Bill dismissed with costs.

Cited: Wiswall v. Potts, post, 189.

(16)

JAMES T. ROPER ET ALS. v. JOHN W. ROPER ET ALS.

1. The general rule in the construction of wills is that persons described, as a class, take in the same way as if each individual comprising the class were called by his proper name; yet where such a construction would have the effect to break up every division of the property that might be made under the will and require a new one whenever and as often as a child might be born in any one of the four families (other phrases of the will also aiding the court), it was *Held* that the testator did not intend a division *per capita*, but *per stirpes*.

2. Where a fund is given to a family of children, with a provision that each afterborn child shall come in for a share, the court ordered that as any one child may come of age and claim his share, he shall give security to contribute *pro rata* to the share of any new participant that may be added to the class.

3. Where a division of property is ordered by a will, the parties are entitled to have it made as soon after the death of the testator as the executor is ready for a final settlement.

CAUSE removed from the Court of Equity of RICHMOND.

The questions in this case are presented by James T. Roper and Green D. Tyson, executors of the last will of Thomas Roper, who, for their protection, ask the advice of the court. The clause of the will upon which the main question arises and which is residuary is sufficiently recited in the opinion of the Court, and all the facts and other provisions of the will necessary to a proper elucidation of the case appear in the opinion also.

Cause set down for hearing upon bill, answers, and exhibit.

R. H. Battle for plaintiff.
Ashe for defendant.

BATTLE, J. The bill is filed by the plaintiffs, as executors of Thomas Roper, for the purpose of obtaining the advice of the Court as to the proper construction of the thirteenth clause of the will of their testator. That clause is in the following words: "I will and direct that all cash in hand, etc., and every other species or description of property
(17) not otherwise devised or named in this will that I may own at my death shall be divided equally among the following heirs: My son, John W. Roper; my grandson, John T. Roper; Mourning Capel's children, that she has now or may hereafter have; Nancy Tyson's children, that she has now or may have hereafter; Martha Gay's children, that she has now or may hereafter have; James T. Roper's children, that he has now or may have hereafter, each one to share an equal proportion, share and share alike."

The first and main question is, do the children of the testator's three daughters and those of his son James take *per capita* with his son John W. Roper and his grandson John T. Roper? Or do the legatees mentioned in this clause take *per stirpes?*

The general rule in bequests of this kind is that the persons described in a class take in the same way as if each individual composing the class were called by his proper name, and, therefore, that each takes a share with the other persons named among whom the division is to be made. This is clearly shown by the cases of *Northey v. Strange,* 1 Peer Williams, 340; *Blackler v. Webb,* 2 *ibid.,* 383; *Ward v. Stowe,* 17 N. C., 509; *Bryant v. Scott,* 22 N. C., 155, to which the plaintiffs' counsel has referred us. But there is an exception to the general rule quite as well established as the rule itself—that if there be anything in the will indicative of the intention of the testator, that the persons described in a class shall take as a unit, then the division shall be *per stirpes* and not *per capita.* See *Bivens v. Phifer,* 47 N. C., 436, where most, if not all, the preceding cases in this State on the subject are referred to; and see, also, the subsequent case of *Lowe v. Carter,* 55 N. C., 377; *Gilliam v. Underwood,* 56 N. C., 100, and *Lockhart v. Lockhart, ib.,* 205. The only inquiry in the case now before us, then, is whether the will affords any indication of the testator's intention that the division which he has directed shall be *per stirpes* instead of *per capita,* and we are clearly of opinion that there is. The clause in question, it will (18) be perceived, not only provides for the existing children of the three daughters of the testator and of his son James, but also for such as they might have at any time thereafter. Such a provision it is competent for a testator to make, as we have recently decided in *Shull v. Johnson,* 55 N. C., 202, and *Shinn v. Motley,* 56 N. C., 490. If, then, a division is to be made *per capita* between the children of the daughters and of the son James and the son John W. Roper and grandson John T. Roper, the respective share of the two latter would be altered and diminished with the birth of each afterborn child of the testator's daughters and son James. Such a result would be very inconvenient, and could have hardly been in the contemplation of the testator. He might very well intend, and no doubt did intend, that the shares to which each family of children should be entitled should be distributed among all the children whom their respective mothers or fathers might have at any time during their lives, which would, of course, cause those shares to vary as each successive child came into being. In every family the amount which any child may reasonably expect from the bounty of his parents is necessarily diminished with the increase of the numbers of his or her brothers and sisters; and in the same way, a fund which a testator may bestow upon a class of persons, each of whom will be

equally near to him in blood or affection, may very properly be so given as to be subject to a new division as the class is enlarged by the birth of other children. The inconvenience of such an arrangement is the necessary consequence of a provision by means of a common fund for afterborn children. If confined as to each share to a single family the inconvenience will not be very great, but if it be extended to a number of persons and families, all of whom are to be affected by the coming into existence of a new participant of the fund, it will be almost intolerable, and the Court must suppose that no testator intended it unless the language of his will is too plain to admit of any other interpretation. In the present case, we think the clause of the will which raises the difficulty does admit of another interpretation which is quite as con-
(19) sistent with the letter and much more in accordance with the spirit of the language which the testator has employed to express his intention. The property mentioned in the clause is directed to be "divided equally among the following heirs." The question is, what is meant by the word "heirs?" for it is manifest that the expression "each one to share one equal proportion, share and share alike," refers to "each one" of those whom the testator calls "heirs." We cannot say that the meaning of the term "heirs" is clear of doubt, but we are of opinion that the strong probability is that the testator intended by the use of that term to signify that John W. Roper was one heir, his grandson John T. Roper was a second heir, the children of his daughter Mourning Capel were together a third heir in the place and stead of their mother, and so on. We the more readily adopt this construction because the testator takes notice in other parts of his will that his three daughters, Mourning Capel, Nancy Tyson, and Martha Gay, and his son James, were alive, and he would more properly have called them "his heirs" if he had not preferred to give the property mentioned in the thirteenth clause to their children instead of to them. The grandchildren could in no sense be heirs to the testator during the lives of their mothers and fathers, but the testator could, without any great impropriety, call them so when he substituted them in the place of their parents. But in doing this he would necessarily mean that each class of children should represent the respective mother and father and take what each mother and father would have done had the property been given to them instead of their children. The conclusion is that the division directed by the clause in question must be *per stirpes* and not *per capita.*

The main question upon which the executors desire the instruction of the Court being thus settled, there is no difficulty in disposing of the others.

No time for the division being fixed by the will, the parties were entitled to have had it made as soon after the death of the testator as the executors were ready to make a final settlement of the (20) estate.

The shares to which the children of the daughters and son James are respectively entitled may be paid over to their respective guardians. The share of each class will be subject to division among the children born or to be born. When any child of a class shall come of age and demand his share, he may be required to give security for refunding if the birth of another child in his class shall render it necessary.

PER CURIAM. Decree accordingly.

Cited: Feimster v. Tucker, post, 74; *Burgin v. Patton, post,* 427; *Chambers v. Reid,* 59 N. C., 305.

CHARLOTTE SHEPARD, EXECUTRIX OF ALFRED SHEPARD, v. ELIZA WRIGHT ET ALS.

Where a testator having seven daughters provided for one by name, and then directed that the residue of his estate should be divided into *nine equal parts,* three of which were to go to his three sons and the other *six parts* to be allotted *to his daughters,* it was *Held* that the meaning of the testator was that each of the *six daughters* remaining to be provided for should have one of the six remaining equal parts.

CAUSE removed from the Court of Equity of NEW HANOVER.

The bill is filed by Charlotte Shepard, the executrix of Alfred Shepard, praying a construction of his will for her guidance and protection. The part of the will immediately in question is as follows: "I give and bequeath to my friend, Joseph M. Foy, of the county of New Hanover aforesaid, the following negro slaves, viz.: Judy and child, Gould and Abel, to have and to hold the said slaves in trust, nevertheless, for the sole and separate use of my daughter Eliza, the wife of John B. Wright, during her life, and after her death for the use and benefit of such child or children as she may leave surviving her; and I further will and desire that after the negroes hereinbefore bequeathed to my (21) wife and the said Joseph M. Foy, trustee as aforesaid for my daughter Eliza, shall have been taken and received by them respectively that the rest and residue of my said negroes shall be divided into nine equal parts, of which my sons George E., Joseph C., and Thomas A. shall be entitled to and receive one share each, and the remaining six shares, which shall be allotted to my daughters, I give and bequeath to my friend, Joseph M. Foy, to have and to hold the said slaves in trust,

however, for the sole and separate use of my said daughters, according to the allotment aforesaid." Besides his daughter Eliza Wright, named in the foregoing clause, the testator left six other daughters, to wit, Carolina Shepard, Charlotte Shepard, Margaret McKimmon, Fanny McAllister, Mary Nixon, and Henrietta Coffield.

The executrix sets forth that she has delivered to Foy, the trustee, for the use of Mrs. Wright, the four slaves—Judy and her child and Gould and Abel—and that after taking out her own part given by a former clause of the will she delivered three shares of the residue to the testator's three sons and the remaining six shares of the slaves belonging to the estate to the trustee that they might be divided off among the six daughters, excluding Mrs. Wright, who was not considered by her as entitled to any further share of the said slaves. The executrix states that Mrs. Wright contends that she is not only entitled to the use of the four slaves given in the first instance, but also to a share of the remaining six shares, after taking out the three shares of her brothers. This is objected to by the six daughters unprovided for, and to save herself from the danger of loss from a wrong view of the subject, she calls upon the parties to appear and litigate the matter before the court of equity. The defendants all answered. Eliza Wright insists upon the construction of her father's will which will let her in for a part of the six shares, while all the others acquiesce in the view taken of the matter by the executrix, and so insist before this Court.

(22) *Fowle and W. A. Wright for plaintiff.*
Person for defendants.

MANLY, J. It will be perceived by a reference to the will that the testator makes provision for a widow and ten children—three males and seven females.

In making a disposition of his slaves, he gives a lot specifically to his wife, with remainder over.

He then gives a specific legacy for the sole and separate use of his daughter Eliza Wright of four slaves, with limitation for life, and remainder over.

The testator next directs that after the respective parcels allotted to his wife and daughter Eliza shall have been taken out from the whole, the residue shall be divided into nine parts, three of which shall be the property of his three boys, respectively, and the other six be allotted to his daughters, and these six lots are also secured for the sole and separate use of his said daughters.

It is obvious the testator intended to confine this last bequest to six daughters, and it seems equally clear that the six were those for whom he

had made no immediate provision in the previous part of his will. It is not practicable to distribute six lots among seven persons and preserve the distinctive character of the lots. And if the testator had intended to give Eliza, for whom he had just made a provision, a share with the others of the residue, he would have provided the requisite number of lots by consolidating and redividing.

The construction contended for by Eliza Wright, one of the legatees of the will, is therefore manifestly erroneous, and the true construction declared to be in accordance with the views and action of the executrix; that is to say, the six remaining lots of the residue of the slaves should be distributed to the six daughters, viz., Caroline, Charlotte, Margaret, Fanny, Mary, and Henrietta, and be held by the trustee named in the will for them in conformity with the trust created.

PER CURIAM. Decree accordingly.

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(23)

MARK JONES v. DAVIDSON A. UNDERWOOD, ADMINISTRATOR OF F. LOCKE.

Where the plaintiff alleged that a certain note to a bank purporting to be the note of another (since insolvent), with the plaintiff and defendant as sureties, was fraudulently misrepresented to him by the defendant (he being illiterate), and he was made to believe that it was the defendant's note, as principal, with such third person and himself as sureties, and that he signed it under that belief, the fact that the plaintiff had sued the defendant in a suit at law for contribution as a cosurety and got judgment, taken in connection with the form of the note and the pointed evidence of the subscribing witness contradicting the whole equity, were *Held* to be preponderate against two witnesses sustaining it.

CAUSE removed from the Court of Equity of STANLY.

On 15 November, 1852, the following note was executed by the parties thereunto signed, viz.:

"SALISBURY, 15 November, 1852.

"Ninety days after date, we, H. D. Kendall, as principal, and Francis Locke and Mark Jones, as securities, promise to pay D. A. Davis or order twelve hundred dollars, for value received, negotiable and payable at the Salisbury branch of the Bank of Cape Fear.

"H. D. KENDALL.

"F. LOCKE.

"MARK (his × mark) JONES.

"B. W. Simmons, witness as to M. Jones."

Kendall, the principal named above, became insolvent after the note was made, and suit having been brought by the bank, judgment was obtained and the whole amount collected off of Jones.

This suit is brought by the plaintiff Jones, alleging that shortly before the signing of this note he had signed another for $1,300, payable to the same bank, in which Francis Locke was principal and H. D. Kendall and himself sureties; that Locke came to him in company with the subscribing witness, B. W. Simmons, and told him that the
(24) former note, which he produced, had been offered at the bank and rejected because it was for too great a sum by one hundred dollars; that he wished him to sign this, which was for a hundred dollars less than the other; that the note was not read to him, but the plaintiff, being illiterate, asked Locke the purport of the note, who assured him that it was just like the other which he had signed; that he asked Simmons, when he was about to sign it, "if it was just like the first," who replied that it was for a hundred dollars less; that having confidence in Locke and believing his assurance that he was becoming his surety in the said note, confirmed, as he understood it, by the reply of Simmons, he put his name to it; that he believed Kendall was then in failing circumstances, and he would not have gone his surety for any amount; that a fraud was practiced upon him in the transaction by the misrepresentation of Locke and the evasion of Simmons.

The prayer of the bill is that the defendant, as the personal representative of Locke (who has since died), may make good to him the amount he has paid on account of said note. The bill states, by way of anticipation, that after the death of Locke the plaintiff sued the defendant in a court of law, alleging that he was the joint surety of Locke in the note aforesaid, and recovered judgment for one-half of the sum paid by him in bank; that he has thus brought suit at law because he was advised he could not recover the whole sum, but he avers that he has not taken out execution on that judgment, nor has he received anything from Locke's estate on that account.

The defendant answered that he had no personal knowledge of the transaction, upon the faith of what his intestate told him, and also from what he had learned from Simmons, he was satisfied Jones knew well that he was signing as the surety of Kendall. He insists upon plaintiff's own version of the transaction as alleged in the court of law.

B. W. Simmons testifies to the affair as stated in the answer. He says that the note was read to the plaintiff three, four, or five times; that Jones hesitated about signing as surety for Kendall, but was
(25) willing to sign for Locke; that Locke told him Kendall was good, and that there was no danger in being his surety, and being thus persuaded, he did, with a full knowledge of its nature, execute the note in question, and he witnessed it. The witness further stated that he understood from both parties that Locke and Mark Jones had signed a note for H. D. Kendall at the Bank of Salisbury for $1,000, which

had been sued on, and that the note in question was to take up and satisfy the said note in suit. The only other person present at the transaction were Turner Ingram and his wife. These two persons testified that the note was not read to Jones, but he was told by both Locke and Simmons that it was like the other note. There was evidence as to the character of Simmons, the most of which pronounced his character good, but all said he was addicted to the excessive use of ardent spirits. Some of them said, however, that about the time of this transaction he had been sober for a year or two.

Kelly, Ashe, and Dargan for plaintiff.
Osborne for defendant.

MANLY, J. This case has received from the Court the consideration which its importance, in a pecuniary point of view, merits, and our conclusion is against the plaintiff's right to relief in this Court.

The equity of the bill rests upon the allegation that the complainant was surety for the defendant's intestate upon a certain note to the Bank of Salisbury.

In the first place, it is to be remarked, the contents of the note show the contrary, and it is but reasonable to require of complainant to take the laboring oar in explaining this presumption against him.

There were present at the transaction, according to plaintiff's testimony, the parties Benjamin W. Simmons and Turner Ingram and wife. Ingram and wife depose that the note was not read, but complainant was told by both Locke and Simmons that it was like a (26) former note in which Locke was principal and Jones surety.

On the other hand, Simmons, who was called upon to be the subscribing witness to the note, says that it was read repeatedly; that Jones' objections to signing it in the condition it was were discussed and finally abandoned by him, and that he understood perfectly he was becoming surety for Kendall and not for Locke.

Added to this presumptive and direct proof against the allegation of the bill is the institution of a suit at law by Jones against Locke's administrator for contribution, as from a cosurety, which has much force as a matter of record against the equity of the bill.

The other proofs, as that of Waller upon the subject of Locke's admission and of divers witnesses as to the character of Simmons, we regard as of little weight.

Upon the whole, we think the preponderance of testimony is decidedly against the equity of the bill, and it is therefore dismissed with costs.

PER CURIAM. Bill dismissed.

DAVID JONES v. CALEB F. HALL ET ALS.

Where a father made a deed of gift of a negro child to his son, who was also a child, and after eight years, during which time both remained under the control of the donor, sold and conveyed the slave to another for half its value, it was *Held* that the latter had no ground in equity to have the gift set aside and the donee declared a trustee for his use.

CAUSE removed from the Court of Equity of JONES.

The defendant, Drury Hall, on 16 July, 1847, made a deed of gift to his son Caleb F. Hall of a negro slave, Mack, and the same being duly attested, he immediately acknowledged and had it registered in
(27) the county of Duplin, where he lived. His said son, as well as the slave Mack were quite young; both remained with the donor as members of the family. Afterwards the said Drury, with his family, removed to the county of Jones into the neighborhood where the plaintiff lived, and sold and delivered the said slave Mack to the plaintiff for the sum of $375, making a bill of sale for the title. It appears from the evidence that the slave at this time was worth six or seven hundred dollars.

The plaintiff alleges in his bill that this deed of gift was intended to defraud him or some other person; that it was not known in the part of Duplin County whence Hall had removed, nor was it known in the neighborhood to which he removed, and where the latter transaction took place; that so far from this, the said Drury always represented himself as the undisputed owner of the slave.

The prayer of the bill is that the deed of gift be delivered up to be canceled, the defendant Caleb be declared a trustee for his benefit, and for general relief.

The defendant Drury Hall answered, denying that he had practiced, or had intended to practice, any fraud on the plaintiff or any one else; that the deed of gift was notorious, not only at Duplin Courthouse, where it was registered immediately after it was made, but in his neighborhood in that county; and when he removed to Jones it became known in that county, and particularly to the plaintiff, who took pains to inquire into the defendant Drury's title before concluding the trade with him, and finally determined, as he said, to risk $375 on the event, and that this sum was not more than half the value of the slave. He explains the circumstance of his remaining in possession of the slave by the fact that both his son and the donee and the slave Mack were very young at the time of the gift and were obliged to remain in his family and under his control. The other defendants answer and deny all combination, etc. Replication and commission and proofs taken, which are sufficiently adverted to in the opinion of the Court.

McRae and Green for plaintiff. (28)
J. N. Washington for defendants.

PEARSON, C. J. The deed of gift, which was duly registered, vested the title of the slave in the defendant Caleb F. Hall. For the purpose of setting this deed aside or of converting the said Caleb into a trustee, the plaintiff alleges that he afterwards bought the slave from the defendant, and that the deed of gift was executed by the said Drury with an intent to defraud the plaintiff. The case does not come within the provision of 27 Elizabeth for the protection of subsequent purchasers—that statute being confined to land; and if we suppose that equity will protect a subsequent purchaser of a slave, for valuable consideration, against a prior voluntary conveyance which was executed in contemplation of such subsequent sale, the proof in the case fails to support the allegation that the deed of gift in this instance was made in contemplation of the sale to the plaintiff. Eight years intervened between the gift and the sale. This excludes the inference that the one was made in contemplation of the other, and the circumstance that the slave continued in the possession of the donor is fully accounted for by the fact that the son was of very tender years and lived with his father, and the slave, who was also a mere child—too young to be hired out—lived there also. Upon the whole evidence, we are satisfied that at the date of the deed of gift it was not in the contemplation of the donor to defraud the plaintiff or any other subsequent purchaser, and as the deed was duly registered, we can only account for his afterwards being able to cheat the plaintiff by the fact of his offering to sell the slave for about one-half of his value—the consideration paid being $375, and the value, according to the testimony, some six or seven hundred dollars. So it was the misfortune of the plaintiff to have been lured into a speculation without taking the pains to prosecute the inquiry which ought to have been suggested by the very law sum for which the defendant Drury was willing to sell. However this may be, there is nothing (29) to affect the conscience of the donee Caleb F. Hall, and no ground upon which, in equity, he can be decreed to give up his title to the plaintiff.

The bill must be dismissed, but with costs as to Drury Hall. The other defendants are entitled to costs.

PER CURIAM. Bill dismissed.

DANIEL McDIARMID ET ALS. v. JOSEPH McMILLAN.

An entry of a tract of land as being "in Richmond County on the south side of Muddy Creek, beginning at or near the ford of the creek where the Rockingham road crosses," without any further indications of its locality, was *Held* to be too vague and uncertain to give it priority as to an individual claiming under another entry and grant.

CAUSE removed from the Court of Equity of RICHMOND.

In 1850 the defendant made an entry of a tract of land (a part of which is that in controversy) which he had surveyed in February, 1851, and in January, 1853, he paid the purchase money and took a grant from the State. Shortly after obtaining the grant the defendant entered into possession, and had the same in possession at the time the plaintiff's bill was filed.

In December, 1852, the plaintiffs made eight entries of land in the same vicinity, the first of which is as follows: "Daniel McDiarmid and Daniel Turner enter 640 acres of land in Richmond County on the south side of Big Muddy Creek, beginning at or near the ford of the creek where the Rockingham road crosses." The seven other entries are described as "adjoining the first and each other." On 27 November, 1854, they caused these entries to be surveyed, and on 27 December in the same year they paid the purchase money and took out a grant embracing the said eight entries and covering a part of the land
(30) contained in the above mentioned grant of the defendant. The plaintiffs insist in their bill that the defendant's entry having lapsed became void as to their junior entry, and that the grant which he obtained thereon was of no validity in equity, and they pray that the defendant shall convey to them the title to so much of the premises as is covered by their grant and also included in his grant.

The defendant, in his answer, alleges that the lands in controversy had been granted previously to one Alexander McMillan and to one David Allison, and that it was not subject to entry when the plaintiff made his entry, and that his grant founded thereon cannot be upheld in equity. There are several other matters urged against the plaintiff's equity and in support of defendant's title, but as the opinion of the Court is based on a consideration altogether independent of these views, it is deemed unnecessary to notice them or the testimony put in by both sides in relation to them.

McKay and Kelly for plaintiffs.
Ashe for defendant.

Pearson, C. J. The plaintiffs are not entitled to relief, because their entries are too vague to amount to notice or give them any priority. *Monroe v. McCormick,* 41 N. C., 85, is decisive. In that case (which is founded upon *Harris v. Ewing,* 21 N. C., 369; *Johnston v. Shelton,* 39 N. C., 85) it is held, "Where one makes an entry so vague as not to identify the land, such entry does not amount to notice, and does not give any priority of right as against another individual who makes an entry, has it surveyed and takes out a grant. By a liberal construction of the law such entries are not void as against the State. It is not material to the State what vacant land is granted, but such entries are not allowed to interfere with the rights of other citizens, and are susceptible of being notice to any one because they have no identity. It would be taking advantage of his own wrong for one to make a vague entry and afterwards take from another land which he had in the (31) meantime entered and paid for." "Where an entry is vague, it acquires no priority until it is made certain by a survey. The good sense of this principle will strike every one as soon as it is suggested."

The first entry of the plaintiffs, on which the other seven turn as a point, is in these words: "Daniel McDiarmid and Daniel Turner enter 640 acres of land in Richmond County on the south side of Big Muddy Creek, beginning at or near the ford of the creek where the Rockingham road crosses." Admit that this reference to "the ford" on the creek fixes a point to begin at with sufficient certainty, what course is then to be taken—up or down the creek? If off from it, at what angle? What shape is the land to lie in—a square, a parallelogram, or some irregular figure? No adjacent tracts are called for and nothing whatever whereby it can be made certain. If this conclusion required authority it is furnished by *Johnston v. Shelton, supra.* There the description was "640 acres of land, beginning on the line dividing the counties of Haywood and Macon, at a point at or near Lowe's Bear-pen on the Hog-back Mountain, and running various courses for compliment," and the Court, admitting that the reference to Lowe's Bear-pen on the Hog-back Mountain in the dividing line of the two counties, fixed a point to begin with with sufficient certainty, held the entry to be too vague, "for it cannot be told whether the land is to be laid off by running east or west on the county line, nor how far in either direction, neither by course or distance or natural objects or other lines, or any other thing."

Horton v. Cook, 54 N. C., 272, was cited for the plaintiffs. That case, however, is distinguished from the cases cited above, in the opinion of the Court, on the ground that the beginning corner was fixed at a certain tree in a certain line of another tract, and "it mentions the headwaters of the creek on which and *the tracts of land belonging to other persons between which it is located.*"

(32) Without reference to the other questions raised by the pleadings, we are of opinion that the bill must be dismissed because of the vagueness and uncertainty of the plaintiffs' entries.

PER CURIAM. Bill dismissed.

Cited: Berry v. Lumber Co, 141 N. C., 393; *Bowser v. Westcott,* 145 N. C., 59.

JOHN H. NELSON, EXECUTOR, v. JOHN J. HALL ET ALS.

1. Where a testator ordered his executor to loan out a certain fund, directed to be raised upon his estate, and the interest applied to the support and education of his children, and a portion of the fund was lost by the insolvency of the parties to whom it was loaned, which insolvency occurred so suddenly that the debt could not be saved by the exercise of *ordinary care*, it was *Held* that such loss ought not to be put upon the executor.

2. Executors are not held responsible as insurers; *good faith* and *ordinary care* is all that is required of them.

CAUSE removed from the Court of Equity of CRAVEN.

Josephus Hall, possessed of a large real and personal estate, made his will, and died in 1843, and appointed the plaintiff John H. Nelson his executor, who files this bill for a settlement of the estate and for the direction of the court of equity upon certain questions of difficulty growing out of the said will. The first clause of this will is as follows: "I leave all my perishable estate (except such as shall be disposed of in the following clauses of this will) to be sold by my executor, together with my schooner, 'the Samuel Hyman,' and the proceeds of such sales, together with the proceeds of the negro hire and all moneyed interests not especially or otherwise disposed of in this will to constitute a fund and to be kept at interest in good bonds to my executor for the education and support of all my children." In pursuance of this direction there were notes, bearing interest, held by the executor on sundry persons, amongst others, a note on John Blackwell, James C. Justice, and William P. Moore for $1,086.79, and another on the same parties (33) for $659; also a note on B. Oliver and W. P. Moore for $50.

The several parties to these larger notes made assignments for the security of their creditors and were taken in and provided for in such assignments, but the assets falling short, only 75 per cent of principal and interest was made on the same, so that 25 per cent of these notes was lost, and the $50 note entirely lost by the sudden bankruptcy of the parties. In the account taken by the commissioner, Mr. Roberts, he only charged the executor with the sum realized and did not charge him with the $50 note. Exceptions were taken to the report on this

account. The evidence taken as to the sudden and unexpected failure of the parties to these notes, also as to that of $50, are sufficiently noticed in the opinion of the Court. There were several questions submitted in the pleadings, but it is not deemed necessary to notice them here, as they are treated of in the opinion of the Court. The chief questions in this Court were upon the exceptions to the commissioner's report.

J. W. Bryan for plaintiff.
No counsel for defendants in this Court.

MANLY, J. The purpose of this bill is to settle the estate of Josephus Hall, deceased, to ascertain the balance in the hands of the executor, who is complainant, and to procure from this Court a declaration of rights in respect to the principal legatees, the children. The most of the questions raised as to these rights are merely speculative and relate to certain limitations over to the survivor or survivors in case any or either of them shall die. As they are all living, it will be improper for us to anticipate the event of death and adjudicate the rights which may spring up out of it. The contingency upon which the questions will become practical and necessary to be decided will probably happen in the way of our successors.

It was referred to the clerk and master in the court below to (34) take an account of the fund belonging to the estate. This account has been taken and reported, and two exceptions are filed to the same:

First. The allowance of 25 per cent discount upon two notes of Blackwell, Justice, and Moore—the one for $1,086, the other for $659.

Secondly. The total loss of a note of Oliver and Moore for $50.

This is part of a fund which the testator has directed shall be kept at interest, upon good bonds, for the education and support of all his children. The notes in question were taken and kept by the executor in the management of this fund, and became uncollectible by the bankruptcy of the parties.

We have considered the evidence relating to the matter of the exceptions, and especially to the sudden and unexpected character of these bankruptcies, and conclude the executor is not liable to make good these losses. All the witnesses examined concur that the failures of Blackwell, Justice, and Moore were a surprise to the community in which they resided; that they were possessed of large resources, were transacting extensive business, and were held in the highest grade of credit down to the day of their respective assignments for the payment of debts. The failure of Oliver, who was the principal in the small note of $50, took place about five months before Moore's, who was the surety. This,

if the debt had been larger or the standing of the surety less unquestionable, might have been sufficient to put the executor on his guard and induce him to seek other security, but under the circumstances, we think it was not. Such losses as have occurred in the management of this fund are incidental to investments of a similar kind in all communities. They happen even to the most vigilant, and must happen oftener to those who exert only ordinary caution, and this last is the grade of care to which an executor is bound. Executors should not be held responsible as insurers; all that a sound public policy requires is that they shall act in good faith and use ordinary care The proofs satisfy us that there has been no want of these, and we, therefore, conclude the executor is not liable.

(35) It seems from the pleadings and proofs that one of the daughters, Eliza Jane, has arrived at the age of 18 years, and the will provides that all the common stock property not specifically bequeathed shall be kept by the executor, and when the son, John H., arrives at the age of 21 years he is to have his distributive share. When Eliza Jane arrives at 18 or marries, she shall receive her share of the balance, and Josephine, in like manner, to take the residue; and in case of the death of any of the said children, the survivor or survivors to be entitled to the interest of such deceased child, etc. Eliza Jane having arrived at the age designated by the testator, is clearly entitled, we think, to have her share allotted to her.

This is a response to the first inquiry, which we have been invoked to answer in regard to the construction of the will. Other inquiries, we have already stated, it is not expedient or proper for us to answer, for the reason that they depend upon what we hope are remote events, which it may never be our lot to witness.

Let a decree be drawn in this case overruling the exceptions and confirming the reported account of the master in all respects, and declaring it to be the opinion of the Court that Eliza Jane Hall is now entitled to have her share of the estate remaining on hand and belonging to the children allotted to her in severalty.

Let the costs be paid out of the funds in the hands of the executor.

PER CURIAM. Decree accordingly.

Cited: Williams v. Williams, 59 N. C., 65; *Patterson v. Wadsworth,* 89 N. C., 410; *Syme v. Badger,* 92 N. C., 715; *Haliburton v. Carson,* 100 N. C., 108; *Gay v. Grant,* 101 N. C., 209; *Moore v. Eure, id.,* 16; *Pate v. Oliver,* 104 N. C., 466; *Tayloe v. Tayloe,* 108 N. C., 74.

(36)

SAMUEL WEBBER AND WIFE v. BENJAMIN TAYLOR.

1. Where a party who had passed a tract of land by deed, absolute on its face, seeks to have a reconveyance upon the ground that the conveyance was intended as a security for money loaned, and the land had been twice conveyed, subsequently, with notice of the plaintiff's equity, it was *Held* that the first and second purchasers, as well as the third, were necessary parties.

2. The objection of a want of parties does not necessarily require the court to dismiss the bill, but it may be ordered to stand over, with leave to the plaintiff to amend his bill.

CAUSE removed from the Court of Equity of GREENE.

This case was before the Court at December Term, 1854 (55 N. C., 9), and the facts are there stated with sufficient fullness to enable the reader to obtain whatever may be deemed necessary to a fuller understanding of the case than is furnished in the opinion of the Court at this term.

No counsel for plaintiffs.
Donnell and Warren for defendants.

BATTLE, J. The main allegations of the bill upon which the plaintiffs seek a reconveyance of the land in question from the defendant are that the land was conveyed by a deed absolute in its terms to one Edward Carman, but was intended as a mere security for a small debt which was due to him; that afterwards, one Thomas Moore paid the debt to Carman, amounting only to the small sum of $30, and took from him an absolute deed for the land, upon the express understanding, however, that he was to hold it for the separate use of the *feme* plaintiff and her children upon being repaid the money which he had advanced; that subsequently the plaintiffs tendered him the amount due, which he refused to receive unless they would also pay a debt of about $50 which he alleged was due from the plaintiff Samuel Webber, and that he afterwards sold the land to the defendant, but that the defendant, at the time of his purchase, had full notice of the plaintiffs' equity. The prayer is that the deeds to Carman and Moore may be declared void, and that the defendant may be compelled, by a decree of the Court, to convey (37) the land to the separate use of the *feme* and her children. Carman and Moore are not made parties to the suit, and there is no offer to pay to them, or either of them, or to the defendant Taylor, the debt which the plaintiffs admit that they owed, first to Carman and then to Moore, and for which the land was to be a security.

The defendant, in his answer, insists that he purchased *bona fide* for a fair price and without any notice of the claims of the plaintiffs,

though he admits that he knew they were in the actual possession of the land, thinking, however, that they were there as the mere tenants at will of his vendor.

It is much to be regretted that in the present state of the pleadings the cause cannot be heard on its merits. It is obvious that the plaintiffs cannot have a reconveyance of the land, except upon the footing of treating their conveyance to Carman as a mortgage, which was assigned successively to Moore and the defendant. In that view, Carman and Moore are necessary parties in order to have the debt due them ascertained and to make them contributory to the defendant in the event of a decree against him, and there should be an offer on the part of the plaintiffs to pay it. *Guthrie v. Sorrell,* 41 N. C., 13; 1 Daniel's Chap. Prac., 329.

The objection for the want of parties does not necessarily require us to dismiss the bill, but we may order it to stand over, with leave to the plaintiffs to amend their bill. *Gordon v. Holland,* 38 N. C., 362; *Kent v. Bottoms,* 56 N. C., 69. This we deem the proper course in the present case, because the objection of a want of proper parties was not taken in the answer, but was made for the first time at the hearing, and that, too, after the defendant had himself taken the depositions of Carman and Moore as evidence in the cause. If these persons be made parties defendants it may be necessary, upon their answers being filed, that additional testimony should be taken; and in order to give the parties
(38) an opportunity to take such testimony, should it become necessary, the cause must be remanded to the court below. The plaintiff must pay the costs, as in the case of a dismission without prejudice. *Guthrie v. Sorrell, ubi supra.*

PER CURIAM. Decree accordingly.

Cited: Harrington v. McLean, post, 137; *Hawkins v. Everett, post,* 45.

EVAN WILLIAMS v. WILLIAM HOWARD ET AL.

Where goods were placed by a debtor in the hands of his surety for the purpose of indemnifying him against certain debts, which he immediately paid off, it was *Held* that the fact of the surety's making the application of the fund to the payment of these debts, instead of handing it to the other for him to do it as was stipulated in the contract, gave the principal debtor no right to convey his claim on the said surety in respect of these goods for the security of other debts or make the surety again account for the value of them, without allowing him credit for the application of the fund made by him.

CAUSE removed from the Court of Equity of LENOIR.

The bill sets out that the defendant Howard was indebted to divers persons (naming them) in several sums, amounting to about $3,000; that the plaintiff was surety on these debts, and the said Howard being in failing circumstances, plaintiff applied to him for indemnity against loss on account of such suretyship; that the said Howard agreed to deliver him goods to the amount of said debts, which plaintiff was to sell and apply the proceeds to the payment of these debts, and the overplus, if any, he was to pay to the defendant Howard; that these debts were to be accounted for at the original cost and 5 per cent added; that accordingly a list of the goods was taken as the same were delivered to the plaintiff, and the prices set down therein on the statement of the defendant Howard and the list left with him as the contract by which the plaintiff was to be charged and by which he should account with Howard; that he paid off the debts very soon after taking these goods into his possession, and has been very willing to account (39) with defendant Howard at a fair price for the goods; that according to this list, the goods amounted in value, with the 5 per cent added, to $3,236.55; that this list and the prices were made upon the faith and confidence that the prices and qualities of the goods were known to said Howard, who had the original invoices, and were fairly and honestly stated by him, but that in this case he has been deceived and defrauded by Howard; that the goods are set down at higher prices than the original cost, and that the quality of them is such as by no means to justify the prices put upon them in the inventory under which he was to account; that as soon as he discovered the fraud practiced upon him he went to Howard, making known his complaint, and desiring him to produce the original invoices, and offering to settle with him according to such invoices, but that he refused to produce them. The plaintiff, in his bill, further states that shortly after taking these goods into his possession, the defendant Howard made a deed of trust conveying the claim he had on the plaintiff to the defendant Jackson, as trustee, to satisfy and pay off certain other debts due to sundry persons, excluding those above mentioned, wherein the plaintiff was surety, and that Jackson brought suit at law against him in the name of the said Howard for the full value of these goods. The prayer is for an injunction to stay this proceeding at law and for an account and settlement according to the real value of the goods, with 5 per cent added.

The answer of Howard admits that the goods were placed in the plaintiff's hands as security for the debts enumerated in plaintiff's bill, but he says they were to be paid for on being delivered to the plaintiff, and that he (H.) was to make the application of the proceeds to the said debts; that on getting possession of the goods, the plaintiff refused to let him have the money and insisted on being allowed to pay the debts

in question; he says he then conveyed the claim on the plaintiff to the other defendant, Jackson, for the payment of debts other than
(40) those provided for in the original dealing. He denies that the goods are overcharged in the list made by the plaintiff. He says they were bought by him at different times and were contained in sundry invoices, some of which were lost or mislaid, and that it would have been difficult and tedious to refer back to these invoices for the prices, so that they were stated from an inspection of the private marks put on the goods from these invoices, and from which the original cost as fully appeared as if they had been consulted.

The injunction was ordered below to stand over till the hearing, and afterwards the cause was set down for hearing on the bill, answer, and former orders and sent to this Court to be heard.

McRae for plaintiff.
Stevenson for defendants.

PEARSON, C. J. The allegation of fraud on the part of the defendant Howard, in stating the prices and quality of the goods received by the plaintiff, is denied, and, as the plaintiff is so unfortunate as to be unable to offer any evidence, this part of the bill fails for the want of proof.

The plaintiff further alleges that being bound as the surety of Howard for several large debts, amounting to about $3,000, and becoming apprehensive of loss on account of Howard's embarrassed condition, it was agreed that he should take of Howard's goods to that amount and apply the price to the payment of the debts for which he was bound as surety, and account to Howard for the excess, should there be any, and that he has accordingly paid off the debts and offered to pay the excess to Howard, but that Howard in the meantime, under pretense that the plaintiff was indebted to him for the price of the goods, has assigned the claim to the other defendant, Jackson, in trust, to collect and pay it over to the other creditors of Howard, and that Jackson has commenced an action at law in the name of Howard. The prayer is for an account in
(41) order to ascertain the excess of the price of the goods over the debts which the plaintiff has paid and for an injunction as to the balance of the price.

Howard admits that, being in failing circumstances, at the request of the plaintiff, he proposed to secure the payment of the debts for which the plaintiff was bound as his surety, and with that view "he sold to the plaintiff a bill of goods to the amount of about $3,220, to be paid for on delivery, the proceeds of the said sale to be applied by Howard in the liquidation of said debts so far as was necessary"; but he avers that the plaintiff, after he got possession of the goods, refused to pay the price

to him and insisted upon being allowed to make the application himself to the liquidation of the debts, and thereupon he (Howard) assigned the debt to Jackson in trust for other creditors.

The parties agree as to the essential fact that the object of dealing was to save the plaintiff from loss by securing the payment of the debts for which he was bound as surety, but they differ in respect to whether the plaintiff or Howard was to make the application of the money; and the plaintiff, being so imprudent as to neglect to provide evidence of the transaction, must be content to abide by Howard's version of it. So the question is, does that establish an equity in favor of the plaintiff? We think it does. Howard admits a trust. He was to receive the money in trust to apply it to the liquidation of the debts for which the plaintiff was bound. Did the refusal of the plaintiff to pay the money over to him discharge him from the trust, so that he could, in conscience, collect the money from the plaintiff and apply it to the payment of other debts or assign it to a trustee for that purpose? We can see no principle upon which he was relieved from a performance of the trust and acquired a right to apply the fund to a purpose different from that for which it was created and to which it was devoted. On the contrary, as the plaintiff made known to Howard his intention to apply the money to the payment of the debts, whereby the main object of the dealing would be accomplished and the trust undertaken by Howard be performed, so far as he did so, he did the very thing that Howard was bound (42) to do, and in taking an account of the fund is clearly entitled to a credit for the amount so paid. Indeed, if Howard intended honestly to apply the money according to the trust, it could make no sort of difference whether it was done by himself or by the plaintiff, and his making so immaterial a matter a pretext for an attempt to misapply the fund and a color for a breach of trust raises an inference much to his prejudice and tends to show that the trust had been executed more truly than it probably would have been had his anxiety to get hold of the money been gratified.

There will be a reference to state the account upon the basis of the list of prices, etc., made when the goods were received.

PER CURIAM. Decree accordingly.

THOMAS W. HAWKINS AND ADA, HIS WIFE, v. REUBEN EVERETT, EXECUTOR.

1. It is a settled rule of this Court that when a fund is given to a class, all who answer the description, when it is to be paid, are entitled to participate in the bounty.

2. A bequest of a fund, therefore, "to the heirs of the body of A.," to be paid as they come of age, will take in all the descendants of A. that were born at the testator's death, and also those born after that event and between that and the time of the first child's arrival at twenty-one.

CAUSE removed from the Court of Equity of NEW HANOVER.

James Mumford, of the county of Onslow, in his last will, bequeathed, among other things, as follows:

"Item. I give and bequeath unto the lawful heirs of Leah Melton, with the exception of James Mumford Melton, which I have already provided for, the sum of $500, to be put on interest until they
(43) become 21 years of age, and then the principal and interest to be paid over to them by my executors."

At the death of the testator, Leah Melton had but one child, the plaintiff Ada, who has intermarried with the other plaintiff, Thomas W. Hawkins; but since then, and before Ada arrived at 21, she has had four other children, who are all alive. The bill is filed under the impression that the plaintiffs are entitled to the whole of the $500, and the prayer accordingly is that it be paid over by the executor, who qualified.

The defendant demurred to the plaintiff's bill upon the ground that it appeared therefrom that Leah Melton had four other children who are not made parties to the bill, and the main question was, whether the legacy of $500 was devisable among the whole five children, or whether the plaintiff Ada was alone entitled to it.

Another question raised on the argument was, whether Ada or any other one of the children could get a share till the youngest child of Leah Melton arrived at the age of 21.

The cause being set for argument on the demurrer, was sent to this Court.

Baker for plaintiffs.
W. A. Wright for defendant.

PEARSON, C. J. The question presented by the pleadings is, Does the entire fund belong to the plaintiff Ada, or is she entitled only to one-fifth part, leaving the residue for the other four children of Leah Melton?

The words "lawful heirs," in the first part of the clause under consideration, are explained by the words "the rest of the lawful heirs of her body." So the clause should read thus, "I give $500 to the lawful heirs of the body of Leah Melton, except her son James to be put on interest until they become 21 years of age, and then the (44) principal and interest to be paid over to them by my executors." "Heirs of the body" has a more extended meaning than "children." It is synonymous with "issue," and includes "children" and the descendants of any child that may be dead. That point, however, does not arise, for all of the children of Leah Melton are alive, and the question is, Does Ada, who was the only child born at the death of the testator, take the whole, or do the four children born afterwards and before Ada arrived at age share with her?

It is a well-settled rule of this Court that when a fund is given to a class, all who answer the description at the time, when it is to be paid, are entitled to participate in the bounty. This rule is based on the principle that as many objects of the testator's bounty as possible ought to be included, and there is no necessity for ascertaining the owners of the fund until it is to be distributed.

There is no special circumstance to take this case out of the operation of the rule, and as all of the children were born before Ada arrived at age, it is immaterial, for the purpose of this bill, whether that was the time for the distribution of the fund, or whether it is to be postponed until the youngest child arrives at age, for in either view the demurrer must be sustained on the ground that the claim to the whole, which the plaintiff set up in the bill, is unfounded, and the other children are necessary parties.

As the parties desire a definitive construction of the will and a declaration of their rights, so that the executor may administer the fund without further litigation, and we have had occasion to form an opinion after a full argument, we feel at liberty to say that the plaintiffs were entitled to the share of Ada when she arrived at age, and that the entire fund is not to be held up until the youngest child comes of age. The clause should read, "to be put on interest until they respectively become 21 years of age, and the share of each child, principal and interest, to be paid over as they respectively arrive at that age." The words used in the will are inaccurate, and, in fact, do not make sense, for there can be no one time when several children become 21 years (45) of age. When the oldest arrives at that age the others will be behind, and when the youngest, the others will have passed it; so the sense requires that respectively should be understood, and this will make the provision in accordance with what is usual and natural in respect to such bounties. As each child respectively arrives at full age, he will

stand in need of assistance to make a start in the world, and we must suppose that it was the intention of the testator to render it to them at that time, in the absence of any clearly expressed purpose to postpone it in regard to all the objects of his bounty, except the youngest child. In other words, there is a presumption that he intended to put them all on an equality and to give them a like benefit, nothing appearing to the contrary.

The plaintiffs have leave to amend by making the other children parties plaintiff, and making the allegations of the will conform thereto, and there may be a decree declaring the rights of the parties according to this opinion. The plaintiffs will pay costs as in case the bill was dismissed. See *Webber v. Taylor, ante,* 36.

PER CURIAM. Decree accordingly.

Cited: Irvin v. Clark, 98 N. C., 445; *Wise v. Leonhardt,* 128 N. C., 291; *Cooley v. Lee,* 170 N. C., 21.

(46)

JOHN O. GOSSETT AND WIFE AND OTHERS v. JOSEPH A. WEATHERLY, EXECUTOR OF ISAAC WEATHERLY.

1. In a suit brought for the settlement of a copartnership, where it was established that the defendant had been a member of the firm, it was *Held* that the onus of proving an averment of the dissolution of the firm devolved upon him.

2. Where one of a copartnership of three was permitted to withdraw from the firm, it was *Held* that no inference was to be drawn from this, that the copartnership was not continued between the other two.

3. The Court is inclined to the opinion that no trust for emancipation can be supported unless express provision is made for the removal of the persons attempted to be freed beyond the limits of the State.

4. Where a will provided that a female child should be emancipated at the age of twenty, and gave her a tract of land and but a small sum of money, although the testator had abundance of money, and enjoined it upon his executors to see that she received the benefit of the land, it was *Held* that the will showed an intention that she should remain in the State after being liberated, and the provision was therefore ineffectual.

5. A revocation of a will in express words will prevail, though the object for which it was made fails as being against public policy.

CAUSE removed from the Court of Equity of GUILFORD.

The bill is filed by the female children of Isaac Weatherly and the husbands of such as are married against the defendant, who is the only son and executor of his will, for a settlement of the estate and the payment of legacies. It appeared from the pleadings and proofs that, under

articles entered into in 1847, the testator Isaac and the defendant Joseph, with one James S. Close, entered into a copartnership in the business of buying and selling slaves, which they carried on until 1850, when the last named partner withdrew, and the transaction was evidenced by a written instrument, which, in substance, is as follows:

"Basis of a settlement between Isaac Weatherly, James S. Close, and Joseph A. Weatherly, as agreed on by them 12 September, 1850.

"Whereas, Isaac Weatherly, James S. Close, and Joseph A. Weatherly have been engaged in the traffic of negroes for the last four years preceding this date under the name and firm of Weatherley, (47) Close & Co., and as James S. Close wishes to withdraw from the firm, the following conditions of settlement are agreed upon:

"Article 1. Isaac Weatherly and Joseph A. Weatherly take the debts due the firm, to wit, B. Hail's note (and others, amounting in all to about $6,580). Any loss sustained in the collection or failure to collect said notes, or any part of them, one-third of such loss will be borne by James S. Close.

"Article 2. Isaac Weatherly and Joseph A. Weatherly pay the debts owned by said firm, to wit, Mrs. Gerringer's note, $510 (and others, amounting to about $10,200). Any other notes or accounts not specified that may be brought, found, or originated, one-third of all such to be borne by James S. Close: *Provided* all such shall have been made before 1 February, 1850. This proviso not to release Close from obligations already incurred.

"Article 3. Isaac Weatherly and Joseph A. Weatherly are to pay James S. Close $4,124.68, for which amount they have given their note to him." (Signed by the several parties.)

The business was thence carried on extensively by the said Joseph A. Weatherly till the death of Isaac Weatherly, which happened in March, 1858, and it was alleged by the plaintiffs that said Isaac was all that time a partner in the business; that large profits were made by them, a moiety of which they claim as a part of the estate of the said Isaac under the seventeenth clause of the will, where it provided that all the property not devised or bequeathed shall be sold and the proceeds equally divided between all the testator's children, and they call for a discovery of the amount of these profits and full account of the whole dealings of the copartnership from 1847 to 1858.

The plaintiffs claim, also, as part of the estate of the testator, as falling into the residuary fund, a negro girl named Margaret, attempted to be emancipated against the policy of the law and a tract of land given to her. The facts in relation to the girl and the land are as follows: In 1844, Isaac Weatherly made and delivered to the defendant the following instrument: (48)

"15 January, 1844.

"STATE OF GEORGIA—Muscogee County.

"Received of Joseph A. Weatherly $500, in payment for the following negroes, to wit, Lizza, a woman aged 20 years, and Margaret, her daughter, a mulatto girl, aged 4 years, and Bill, her son, a mulatto boy, aged 2 years, both to be free at the respective ages of 18 and 20," with warranty of title as to the mother, and signed by Isaac Weatherly, with his seal affixed.

By the fourth clause of his will, the girl Margaret is simply given to the defendant.

By a codicil dated 26 November, 1857, in which various alterations are made in the dispositions of his will, he bequeaths and devises as follows:

"I will and devise my yellow girl Margaret, at the discretion of my executors, to be emancipated, and give her, said Margaret, $200."

A tract of land, called the "Albert Gorrell" tract, by a clause in the will, he had given to Joseph A. Weatherly and his two sisters, Betsy and Polly, with power in him to elect whether to take one-third of the land or to pay each of his sisters $600 and take the whole of it. Immediately after the clause above quoted occurs in the codicil the following: "My will and desire is to dispose of the Albert Gorrell tract different than is stated in my will, to wit, as follows: I will and desire 100 acres to be run off of the north end, so as to include the house, meadow and mill; the balance I will to my said negro girl Margaret herein emancipated, and desire my executor to see that she gets the benefit of the said land. The said hundred acres to be run off of the Albert Gorrell tract I wish and direct to be divided between my children, Joseph A. Weatherly, Nancy Gossett, Louisa Gamble, Catharine Kirkman, Rebecca Kirkman, Mary Robbins, Elizabeth Clark, but Joseph A. Weatherly to keep
(49) the land at valuation, if he desires, and pay his said sisters their part in money." . . .

"If it becomes necessary to sell the land given to the yellow girl Margaret, I desire my son, Joseph A. Weatherly, to take it at valuation."

Under these circumstances, it was insisted by the plaintiffs that both the slave Margaret and the land intended for her fall into the residuum, and they pray that the same may be sold unless the defendant elects, as provided in the last mentioned clause of the codicil, to take the said land, in which case, that he may account for the same at valuation.

The answer of the defendant states the particulars of the terms of copartnership entered into in September, 1847, between himself and his father, Isaac Weatherly, and Close; that the capital was all borrowed and a portion of the negroes purchased on a credit; that the same par-

ties had been trading as copartners for a year previous to 2 September, 1847, but on this day they entered into written terms; that their business continued until 1850, "when they dissolved and made a full settlement of all their partnership transactions up to that time," and he refers to the instrument above set forth (marked C) as sustaining this allegation. He says that his father (Isaac) agreed to take $4,000 for his share of the profits, and that he gave his bond for the same, but has never seen or heard of the bond since that time; that he did not find it among his testator's papers. He further states that he carried on the business of trading in slaves with the means realized from the preceding business, and that his father was not a partner, but with his permission, and to improve and extend his credit, he often signed papers, where it was necessary, with the name of "Weatherly & Son." He says that the net profits of his business since 1850 is about $25,000, and that if he is bound to account for any portion of this amount as a part of the testator's estate, that he is ready and willing to produce, whenever required by this Court, a full and detailed account of all his trading since the settlement of 1850.

The defendant, further answering, sets forth item 5 of the will (50) of Isaac Weatherly, in which are these words: "I also give him all the debts of every kind which he owes me," and he says "he is advised that should the Court be of opinion that he was a partner with the testator since 1850, still all the profits made by him since that time pass to this defendant under that clause.

It was referred to a commissioner, Mr. W. L. Scott, to state an account of the estate of the testator in the hands of the defendant as executor, who, in his report, refused to charge him with any part of the profits of the business of the traffic in slaves after the year 1850, for which the plaintiffs filed an exception. The commissioner also refused to charge the defendant with the value of the slave Margaret, for which the plaintiffs also excepted, and the cause was in this state brought to this Court, and stood for further directions on the report and exceptions.

Morehead for plaintiffs.
McLean for defendant.

PEARSON, C. J. The first exception to the commissioner's report is allowed. The answer sets out an argumentative denial of the allegation of a copartnership between Isaac Weatherly and the defendant after September, 1850. It refers to the exhibit, marked C, as the basis of a full settlement and dissolution, and avers certain explanatory matters, from which the defendant draws the inference that there was no copartnership after the date above stated. But supposing it possible that the

Court might make a different inference from the aforesaid exhibit C and the other matters averred, he says "he is advised, should the Court be of opinion that he was a partner with the testator since 1850, still all the profits would pass to him under the fifth clause of the will." We think the defendant and the commissioner fell into error in regard to the legal effect of the exhibit C. It does not purport to be, and is not in fact, an entire dissolution of the firm which, according to the
(51) articles of 1847, was composed of Isaac Weatherly, James S. Close, and Joseph Weatherly, but is, in its legal effect, only a partial dissolution by the withdrawal of Close from the firm, leaving Isaac and Joseph Weatherly still in copartnership under the original articles which, as between them, continue in full force. The instrument recites, "as James S. Close wishes to withdraw from the firm," it is agreed that he may do so on the terms that Isaac and Joseph Weatherly are to take all of the debts due to the firm—are to pay all the debts due by it, and are to pay to Close $4,124. Clearly the only effect is that Close withdraws and Isaac and Joseph are still connected as copartners. If there was afterwards a dissolution of the firm, which had thus become reduced to two, it was matter of affirmative averment on the part of the defendant, and then, as was very justly urged by Mr. Morehead for the plaintiffs, the *onus* of proof would have been on the defendant. But there is no distinct averment, and no proof is offered in regard to it. With respect to the question whether, supposing the firm not to have been dissolved as between the father and son until the death of the former, the son does not become entitled to all of the profits by the fifth clause of the will, an opinion will not be declared until the Court is put in possession of additional facts by another report showing the condition of the firm at the death of the testator—what slaves, if any, were then on hand; what debts, if any, were due by third persons to the firm, standing either in the names of Isaac or Joseph Weatherly or of Joseph alone; if they constituted a part of the effects of the firm, what, if any, debts were due by Joseph to the firm or by the testator to the firm; what money, if any, belonging to the firm was on hand. And as the defendant, in his answer, states that if he is bound to account for any portion of this amount, he is ready and willing to produce, whenever required by this Court, a full and detailed account of all his trading since the settlement in 1850, the commissioner will call on him for such account, to be filed with his report, and to aid him in ascertain-
(52) ing the condition of the firm. He will, also, set out any special matter at the instance of either party, and particularly any evidence the defendant may produce in relation to the $4,000 mentioned in his answer as having been executed by him to his father, and the consideration for which it was given.

The second exception is also allowed. We are not certain that we apprehend the idea intended to be conveyed when the defendant says "he is advised and believes that the clause in the will directing the said girl to be emancipated is only in affirmance of the deed of gift." But it is clear that the defendant cannot set up any claim under the deed of gift in opposition to the will, for one is not allowed to claim under and at the same time against a will; and from the large interest which is given to the defendant by the will, it is presumed he elects to take under it. There is, however, no clashing between the deed and the will, and the latter merely sets out with greater distinctness the intention of the testator with respect to the slave Margaret. So the question depends upon the construction of the will.

This Court is inclined to the opinion, that in order to carry out the policy of the law and prevent freed negroes from remaining among us, the true principle is not to support any trust for emancipation unless express provision is made that the slaves shall be sent to Liberia or somewhere else. But without resorting to that principle, we think, in this instance, the will furnishes evidence that the wish and intention of the testator was that the girl should remain in this State, and the decision may be put on the matter of fact, as in *Green v. Lane,* 45 N. C., 102.

If the testator had stopped after directing the girl Margaret to be emancipated and giving her $200, we should have been slow to come to the conclusion that his intention was to tear asunder all of the past associations of her life and to have her sent alone, at the age of 20, and turned loose among strangers in a foreign land with an allowance of $200. But all doubt is removed by the fact that he revokes the devise of the Gorrell tract of land for the purpose of giving it, (53) except 100 acres, to the girl Margaret, and desires his executor to see that she gets the benefit of it. If she was to be sent out of the State, why give her a tract of land? He had an abundance of cash means, and money was what she would need, provided it was intended or expected that she was to leave the State.

These two cases show that the principle referred to above is the true one. Its adoption is the only way in which the subject can be placed on a certain footing and the courts be relieved from the irksome task of trailing up from circumstances and inferences, more or less strong, so as to expose to view a secret trust which is opposed to the general good, but much in accordance with the private feelings of many who are inflamed by a mistaken notion of charity. In stating the account the defendant must be charged with the value of this slave, which will fall into the residuary fund.

We are of opinion that the devise of the Gorrell tract of land is revoked by the codicil executed November, 1857. As to 100 acres of it, a different disposition is made, and if the defendant elects to take it at valuation, the value will be fixed at the time of his election, which he will be required to make within a reasonable time after the decree. As to the balance of it, the fact that the devise to the slave Margaret is ineffectual does not prevent it from having the effect of a revocation; besides, he says he intends to make a different disposition of it, which amounts to an express revocation; and in the concluding part of the codicil, as if anticipating that the devise to the slave would not be deemed valid, he gives the defendant an election to take it at valuation. This election, in this respect, is subject to the same rule as above. If he elects not to take it at valuation it will be sold and the proceeds will form a part of the residuary fund.

This opinion will be declared and a reference made as above directed.

PER CURIAM. Decree accordingly.

(54)

THOMAS C. MEADOWS AND ANOTHER, EXECUTOR, v. ISABELLA MOORE AND OTHERS.

1. Where a testator bequeathed one-half of his whole estate to his wife absolutely, and after giving several other legacies, gave the undisposed of residue to several persons named, and then provided that "his wife's portion was to be taken off before the other distribution," it was *Held* to be the intention of the testator to give his widow one-half of the gross amount of his estate, irrespective of charges of any kind.

2. Where pecuniary legacies were given to slaves, it was *Held* that the amounts thus intended to be given away remained as integral parts of the estate for the want of a legal taker, and as such fell into a residuary fund provided in the will.

CAUSE removed from the Court of Equity of ROCKINGHAM.

The bill is filed by the plaintiffs as executors of Pearson Moore, praying the advice of the Court in relation to their duties in the payment of certain legacies under the testator's will, the portions of which material to the questions propounded are as follows:

"Item 1. I will and bequeath to my wife Isabella Moore one-half of my whole estate, consisting of lands, negroes, etc.

"Item 2. It is my will that grave-stones . . . be furnished for the graves of myself and each of my deceased children; also, a good stone wall to be placed around the whole of the graves, as large as the wooden paling now is.

"Item 3. It is also my will that my negroes select for their masters whomsoever they wish to be their owners.

"Item 4. I will and bequeath to each of my negroes, namely, Lizzy, Batt, Abel, Joe, Nancy, Sarah, Thomas, and Kitt, $50 each. It is my particular wish that the above request be complied with.

"Item 5. I will and bequeath unto Wilson D. Moore the sum of $500 out of the remainder of my estate.

"Item 6. It is also my will, after the above legacies are disposed of, the remainder of my estate be equally divided between Wilson D. Moore, William Moore, David Moore, Julia Moore, Rosannah (55) Moore; also Ellison Walker, William Walker, Thomas Walker, Emily Walker, and Rachel Walker.

"Item 7. It is also my will that my wife's portion of my estate given to my wife be hers absolutely, to do with as she may think proper. It is my will that my wife's portion be taken off before the other distribution is made."

The plaintiffs allege that conflicting claims have been set up by the several legatees under this will which render it unsafe for them to proceed in the administration thereof without the advice and protection of the Court; they particularly desire to be advised whether the widow takes one-half of the gross amount of the testator's estate, or whether the charges of administering the estate and the legacies to the slaves (which are admitted to be lapsed), the legacy to Wilson D. Moore, and the expenses of the tombstones and wall for the graveyard are to be first deducted and the residue only divided between the widow and the other legatees.

Second. They ask to be advised what becomes of the legacies (amounting to $400) intended for the slaves; whether the same falls into the residuary fund, or whether it is undisposed of and is to be distributed according to the statute of distributions.

Third. Out of what fund are the charges for erecting tombstones, etc., and the legacy to Wilson D. Moore to be paid, and whether the lapsed legacies constitute a part of such fund. All the legatees were made parties and answered.

The cause was set for hearing upon the bill, answers, and exhibit, and sent to this Court.

Morehead for plaintiffs.
McLean for defendants.

MANLY, J. We have examined the will in connection with the pleadings in the case, and are clear in our opinion as to the intention of testator. To us the purpose seems manifest to give the wife one-half of the

(56) gross amount of his estate and to subject the other half only to the payment of remaining legacies and charges.

The legacies of $50 to each of eight slaves do not pass from the estate (for the want of competent persons to take), but remain integral parts thereof, and with all other parts constitute the gross fund from which the wife's half is to be divided. The other half is subject, in the hands of the executors, to the payment of legacies and charges; and after these objects are accomplished, the residue is subject further to a division according to the sixth item of the will.

The wife's rights, as a legatee, are not at all touched by questions as to the lapsing of legacies to the slaves or of the fund into which they rightfully fall, for if those legacies had been to capable persons they would have been taken into the account when the wife's half was to be allotted.

And so we think the expenditure in providing grave-stones and a wall for the burial ground and the legacy to Wilson D. Moore set forth in the bill as items 2 and 4 of the will are charges upon the other entire half of the estate, the lapsed legacies included.

Wherefore let a declaration be made to this effect, and a reference for an account to be taken in conformity.

The costs of this suit may be taxed upon the residuary fund in the hands of the executors.

PER CURIAM. Decree accordingly.

(57)

WILLIAM J. ELLISON v. COMMISSIONERS OF WASHINGTON.

1. Where a nuisance apprehended is doubtful or contingent, equity will not interfere, but will leave the party to his remedy at law.

2. Cemeteries, where the burial of the dead is carefully done, cannot be considered such nuisances as to induce a court of equity to interfere to enjoin the location of them near a dwelling.

3. Equity will not interfere to restrain parties from clearing their marshlands, upon the allegation in a bill that it will impair the health of a neighborhood.

THIS was a motion to dissolve an injunction, heard before *Shepherd, J.*, at Spring Term, 1859, of BEAUFORT.

The facts disclosed in the pleadings are these: The defendants, the commissioners of the town of Washington, in obedience to an act of Assembly and the wishes of the citizens of the town, ascertained by ballot, contracted with one Grist for a plat of ground one mile from town, with the design of laying it off for a public cemetery. The in-

tendant of the town, one Latham, was charged with the duty of procuring a deed from the said Grist for the land above mentioned, but before this was accomplished he died, and in consequence the execution of the deed was delayed. The plaintiff, after this purchase, but before the execution of the deed, purchased a piece of land adjoining that intended for the cemetery, and built him a house thereon. This was done with full knowledge that the commissioners had purchased the ground contiguous, and also that they designed it for a cemetery. It appeared that this land was covered with trees and a part of it was boggy; that the land for some distance beyond it was also low and wet.

The plaintiff, in his bill, prayed the court to enjoin the defendants from converting their purchase into a cemetery, alleging that the south winds which prevailed in summer would drive the fetid odors from this burial ground directly into his dwelling, thereby impairing the health of his family and make the cemetery a nuisance.

He also prayed the court to enjoin the defendants from clear- (58) ing their land, alleging that this marshland, when exposed to the heat of the sun, would render the neighborhood unhealthy, and also that this skirt of thick wood and undergrowth formed an obstruction for his residence against the currents of *miasma* generated in the marshes south of him, and which, without this screen, the summer winds would drive into his dwelling, to the great injury of his family's health. On the coming in of the answer, the defendant moved to dissolve the injunction which had issued in vacation. The court refused to dissolve the injunction, but ordered it to be made perpetual. From this order the defendants were allowed to appeal to this Court.

Warren for plaintiff.
Donnell and Rodman for defendants.

MANLY, J. The subject of nuisances, private as well as public, has undergone much discussion in the courts during the past few years. Amongst other principles established is one which we think definitive of the rights of the parties now before the Court.

It is settled in respect to private nuisances that where the nuisance apprehended is dubious or contingent, equity will not interfere, but will leave complainant to his remedy at law. See Drewry on Injunctions, 242; *Barnes v. Calhoon,* 37 N. C., 199; *Attorney-General v. Lea,* 38 N. C., 205, and *Simpson v. Justice,* 43 N. C., 115.

A consideration of the subject-matter of this complaint, as disclosed by the pleadings, leads us to the conclusion that a place of interment of the dead is not necessarily a nuisance, but that this must depend upon

the position and extent of the grounds, and especially upon the manner in which the burials are effected. The cemeteries which have been established near the principal cities and towns of our country, and which it is the commendable purpose of the Washington corporation to imitate, have sprung from the idea that open space, free ventila-
(59) tion, and careful sepulture, not only prevent such places from becoming nuisances, but make them attractive and agreeable places of resort. The dead must be disposed of in some way, and burial in the earth, suggested by the received revelation of man's origin and destiny, is that most generally resorted to. The commissioners of the town of Washington have selected a spot outside of the town, in obedience to the act of Assembly and the vote of the citizens, and so far as we can perceive, it is fitting and appropriate for that purpose.

If the grounds be arranged and drained, and the burial of the dead be conducted as elsewhere in such establishments, we incline decidedly to the opinion it will not be a nuisance, either public or private. The word nuisance is, of course, used here in its legal sense and is confined to such matters of annoyance as the law recognizes and gives a remedy for. The unpleasant reflections suggested by having before one's eyes constantly recurring memorials of death is not one of these nuisances. Mankind would by no means agree upon a point of that sort, but many would insist that suggestions thus occasioned would in the end be of salutary influence. The death-head is kept in the cell of the anchorite, perpetually before his eyes, as a needful and salutary monitor. The nuisance which the law takes cognizance of is such matter as, admitting it to exist, all men having ordinary senses and instincts will decide to be injurious.

The plaintiff's right to the redress he seeks is put upon one other point, which is that the cutting away the forest growth from the slope of land owned by the defendants will expose plaintiff's residence to unobstructed currents of *miasma* from the marshes south of him.

This position is too broad to be tenable, for it goes to the extent of empowering neighbors to prevent each other from reducing to cultivation all marsh-lands similarly situated. The first effects of the process of preparing such lands for use is probably injurious to health. By exposing them to the action of the sun the exciting causes of disease are more abundantly developed, and consequently disease is more
(60) frequent, but the ultimate effects are otherwise. Drainage and cultivation is healthful, and he who ditches and dries the fertile low grounds of the country is a public benefactor. This point, though made in the pleadings, was not relied upon in the argument, and we dismiss it without further remark.

There is a fact which we think weakens the equity of the plaintiff's bill: He bought and settled on his land after defendants had contracted for theirs, the purpose for which they wished it being known to him. Now, although this is not taken to be conclusive against the plaintiff's equity, it is matter which ought to weigh something and turn the scale in a doubtful case. What he complains of as a nuisance has not been obtruded upon him, but he has met it half-way. Are we not at liberty to infer his apprehension of injury are either not entertained at all or are greatly exaggerated?

The plaintiff has succeeded to all the rights of his vendor when these rights are ascertained. In defining them it is proper for us to consider how and through whose agency the transaction occurred out of which they sprung.

The plaintiff sought the contract, and he ought not to invoke the Court to protect him from what he says are the necessary consequences of it. He cannot rightfully complain if equity decline interfering to remove or restrain defendants, and thus prevent the effects of the contact. He ought at least, before he asks for such interference, to establish at law the injury he alleges.

Public cemeteries, for the orderly and decent sepulture of the dead, are necessary requirements for all populous towns. In fixing sites for them, private must yield to public convenience, and the Courts will be particularly careful and not interfere to prevent such establishments unless the mischief be undoubted and irreparable. Our conclusion is that burying the dead in public cemeteries is not necessarily a nuisance, but might become so by careless and improvident modes of interment. It is at most a doubtful or contingent nuisance, and in such cases the courts of equity will not interfere to prevent, but will leave complainants to establish the nuisance by an action at law when it (61) shall arise.

The pleadings satisfy us that plaintiff voluntarily placed himself by the side of the grounds selected for this establishment, and thus put himself in contact with an apprehended nuisance, and, therefore, the Court will not interfere to restrain defendants in the use of their grounds for the purpose intended unless the nuisance be clear, or unless, as stated before, it shall be established at law.

Having disposed of the interlocutory order appealed from in favor of the defendants upon its merits, we deem it unnecessary to notice the objection to the frame of the bill in making the parties.

Let the order appealed from be reversed and the injunction be dissolved.

PER CURIAM. Decretal order reversed.

Cited: Clark v. Lawrence, 59 N. C., 85; *Dorsey v. Allen,* 85 N. C., 362; *Durham v. Cotton Mills,* 141 N. C., 630; *Hickory v. R. R.,* 143 N. C., 452; *Durham v. Cotton Mills,* 144 N. C., 711; *Cherry v. Williams,* 147 N. C., 457; *Berger v. Smith,* 160 N. C., 208.

ELIJAH FUTRILL v. LITTLEBERRY FUTRILL.

It is an established doctrine, founded on a great principle of public policy, that a conveyance obtained by one whose position gave him power and influence over the grantor, without any proof of fraud, shall not stand at all if without consideration; and that where there has been a partial or inadequate consideration, it shall stand only as a security for the sum paid or advanced.

APPEAL from the Court of Equity of NORTHAMPTON, *Dick, J.*

Motion to dissolve an injunction, heard upon the bill and answer. The plaintiff was an old man, weak-minded, and intemperate. The defendant was his relation and near neighbor. The latter had always been upon friendly terms with him, but upon 23 March, 1857, the
(62) plaintiff made a conveyance of all the property he owned, consisting of the tract of land on which he dwelt, three slaves, horses, hogs, furniture, debts due to him, etc. The conveyance was to take effect as to the land at the death of the grantor. The consideration expressed in the said deed was the "paying and liquidating a certain just debt of $2,500 which the said Elijah owes the said Littleberry Futrill, and for and in consideration of a decent and good support to the wife of the said Elijah as long as she may be the widow of the said Elijah Futrill." The bill then charges that from and after the time this deed was executed, the defendant, who was an intelligent, active man of business, took the management and entire control of the plaintiff's affairs, worked the land, or had it worked, and received the crops; took charge of the slaves, Lawson and Moses, who were mechanics, and kept them employed at wages, and received the hires and profits; sold some of the property and received the money. The plaintiff says in his bill that he was greatly imposed upon and over-reached in the execution of this deed, and that he was for some time ignorant of its contents, but that it, with other facts and circumstances, formed the occasion of giving the defendant a paramount influence and ascendancy in all his affairs and of subjecting the plaintiff entirely to his will and control. That this subjection on his part continued from the said 23 March, 1857, until the latter part of 1858. That about 7 June, in the latter year, the defendant produced to him an account for the previous year's dealing, which amounted to the sum of $952.83; that being feeble in mind,

disqualified by the use of ardent spirits, and overborne by the influence which the defendant had acquired over him by his position as his agent and manager, without canvassing or understanding the grounds of such account, he gave his bond for the same; that he has since been made acquainted with the terms and particulars of the account, and he finds the same extravagant and unjust; one charge in this account is for 389¾ gallons of whiskey at $1 a gallon, 8¼ gallons of rum at $1 per gallon, and several bottles of French brandy, amounting to (63) $6—amounting in all, for spirituous liquors sold, to $404.25, from 24 March to 31 December, and that many credits which the plaintiff enumerates were omitted; that such dealing, even if it is in part true, was faithless and unjust, but that as to the great bulk of it he avers it to be without foundation or truth, and at any rate he ought not to be compelled to pay the bond predicated thereon, or any part of it, until the whole of their dealings can be investigated before this court. The bill states that suit has been brought and a judgment at law had on the bond in question, and the defendant threatens to take out execution against him to enforce the payment thereof. The prayer is that the deed for the land and other property may be declared void and be delivered up for cancellation; that an injunction be issued to restrain the defendant from collecting the recovery at law, and for general relief. The injunction issued.

The defendant admits that he took a deed from the plaintiff for the property mentioned, and that he took the chief management of his affairs from the date of the deed to the making of his affairs from the date of the deed to the making of the bond sued on at law, and that he is the relation of the plaintiff and that a very friendly and confidential feeling existed between them; that the plaintiff was in bad health and addicted to the excessive habitual use of spirituous liquors; but he denies that he was ignorant of the contents of deed or bond or of the mode in which his affairs were conducted by this defendant, or that he was so weak-minded as not to be able to understand the nature of the transactions alluded to, or that there was any fraud, imposition or undue influence in obtaining either of the instruments complained of. He says he did furnish him with the spirituous liquor charged, but that the same was furnished that the plaintiff might sell the same, but that he drank up a good deal of it and gave away much.

Upon the coming in of the answer, the court ordered the injunction which had been issued in the case to be dissolved, and the plaintiff prayed and obtained an appeal.

Batchelor for plaintiff. (64)
B. F. Moore, Barnes, and Fowle for defendant.

BATTLE, J. The counsel on both sides have discussed the question whether the injunction in the present case is a common or a special one, according to the distinction taken between the two kinds in *Capehart v. Mhoon,* 45 N. C., 30, and other cases. This question we deem it unnecessary to decide, because if we assume it to be a common one, as contended by the counsel of the defendant, still there is an equity confessed in the answer upon which the injunction ought to be continued until the hearing.

It is charged in the bill and admitted in the answer that on 23 March, 1857, the plaintiff executed a deed to the defendant, whereby he conveyed to him all his land in fee simple and his personal estate absolutely, to take effect in possession after the death of the grantor upon the expressed consideration of a debt of $2,500 due him from the grantor, and also the support of the grantor's wife, should she become his widow, and as long as she should remain so. The bill charges, and the charge is admitted, that from and after that time the defendant, with the plaintiff's assent, undertook the entire management and control of his affairs and continued in it until some time after the bond in question was given, which was on 7 June, 1858.

Whatever relations may have existed between the parties prior to the execution of the deed above mentioned, it is very certain that after that transaction they assumed the very confidential one of principal and general manager and agent. The principal was an old, weak-minded and intemperate man, while the general manager and agent was his cousin, and was an intelligent, active business man. There was just such an intimate and confidential relation existing between the parties as that which in a similar case induced the great Lord Eldon to set aside a voluntary settlement obtained by a clergyman from a
(65) widow whose affairs he had undertaken to manage. In that case (*Huguenin v. Basely,* 14 Ves. Jr., 273) Lord Eldon was no doubt greatly aided by the argument of the celebrated Sir Samuel Romilly, an argument so masterly that Lord Cottenham, who heard it while he was at the bar, spoke of it in terms of the highest admiration while he was giving judgment, more than thirty years afterwards, in the somewhat similar case of *Dent v. Burnett,* 4 Myl. & Cr., 269. The principle there decided has been applied, both in England and in this State, to all the various relations of life in which dominion may be exercised by one person over another. *Harvey v. Mount,* 8 Beavan, 437; *Buffalow v. Buffalow,* 22 N. C., 241; *Mullins v. McCandless,* 57 N. C., 425. In all the cases to which we have referred the conveyances were voluntary or were founded upon an inadequate consideration. It was not denied, however, that the grantors had a perfect right to make donations of their property or to enter into whatever contracts in relation to it they

might think proper; but it was held upon a great principle of public policy that, without any proof of actual fraud, such conveyance obtained by one whose position gave him power and influence over the other should not stand at all if entirely voluntary, or should stand only as a security for what was actually paid or advanced upon them where there was a partial consideration.

We think the present case, so far as the bond is concerned, comes directly within the operation of this salutary rule. The bond was obtained from a confiding principal, by one who had undertaken the entire management and control of all his wordly affairs. The account, which was the consideration for it, may possibly be just and fair, though it is apparently so extravagant the principal has the right to have the question of its fairness investigated, and a court of chancery ought not to permit the bond to be enforced against him until that investigation has taken place. It is right and proper that the judgment which has been obtained at law—which is itself secured by the injunction bond—should stand as a security for whatever may be found to be justly due from the plaintiff to the defendant. The principle of public (66) policy to which we have already referred forbids that it shall have any other effect.

The order dissolving the injunction must be reversed, and this opinion must be certified to the court below, to the end that an order may be there made directing the injunction to be continued until the hearing of the cause.

It can hardly be necessary for us to say—though to prevent misapprehension we will say—that upon the hearing, all the questions which are presented by the pleadings will be open to investigation. Our present decision relates only to the question of the continuance of the injunction against the judgment obtained at law upon the bond.

PER CURIAM. Decree below reversed.

Cited: Franklin v. Ridenhour, post, 422; *Futrill v. Futrill,* 59 N. C., 337; *Burroughs v. Jenkins,* 62 N. C., 34; *Hartley v. Estes, id.,* 169; *Reed v. Exum,* 84 N. C., 433; *McLeod v. Bullard, id.,* 527; *Tillery v. Wrenn,* 86 N. C., 220; *Costin v. McDowell,* 107 N. C., 548; *Bean v. R. R., id.,* 747; *Bellamy v. Andrews,* 151 N. C., 258; *Pritchard v. Smith,* 160 N. C., 84.

SALLY WILDER ET ALS. v. BENJAMIN D. MANN, ADMINISTRATOR, ET ALS.

A party defendant in a suit has a right to have an order for taking the deposition of a codefendant, *not concerned in interest*, in favor of the applicant.

APPEAL from an interlocutory order made by *Dick, J.*, at the last Spring Term of the Court of Equity of NASH.

At this term the following affidavit was filed in behalf of the trustees of the university, who are codefendants with Benjamin D. Mann, Barbara Goodwin, Sarah Pope, Unity Parker, and others, viz.:

"Edward Cantwell, solicitor for the university, maketh oath that Sarah Pope and Barbara Goodwin are material witnesses for their codefendant, the university aforesaid, and are not interested on the part of the university in this case." And a motion was made for an
(67) order to take the depositions of the said Sarah Pope and Barbara Goodwin, which was opposed by the plaintiffs on the ground that they were parties and had an interest identical with theirs, but the objection was overruled by the court and an order was made in these words:

"It appearing to the court, upon the affidavit of Edward Cantwell, that Sarah Pope and Barbara Goodwin, defendants in this case, are material witnesses for the trustees of the university, defendant, and are not interested on the side of the applicant."

"Ordered that the trustees aforesaid have leave to examine the said Barbara and Sarah, first giving the plaintiffs notice of the time and place, as required by law, subject to all just exceptions."

From which order the plaintiffs prayed an appeal to this Court, which was allowed.

Dortch and Moore for plaintiffs.
Cantwell, Lewis, and J. H. Bryan for defendants.

PEARSON, C. J. We think the affidavit was sufficient to authorize the order allowing the trustees of the university to take the deposition of Sarah Pope and Barbara Goodwin, who are codefendants, subject to all just exception.

It is settled that one cannot object to being examined as a witness on the ground that his evidence will expose him to a debt or civil action, or to a civil liability other than a forfeiture or penalty. *Jones v. Lanier*, 13 N. C., 481; *Harper v. Burrow*, 28 N. C., 30. Doubts were at one time entertained upon this question in courts of law, but it has always been the practice in equity to compel a discovery, notwithstanding the matter disclosed would prejudice the interest of the party, and he could

demur to the discovery only when it would subject him to a penalty, forfeiture, or criminal prosecution. It is admitted that a plaintiff can compel such discovery from a defendant, and the defendant can, by a cross-bill, compel a like discovery from the plaintiff or a codefendant. In our case the trustees of the university may compel a (68) discovery from their codefendants, Sarah Pope and Barbara Goodwin, by a cross-bill, but the discovery could only be used against them and would not be evidence against the plaintiffs because they would have no opportunity to cross-examine, and the purpose of taking their depositions is to make it evidence against the plaintiffs. If, as we have seen, Sarah Pope and Barbara Goodwin cannot refuse to give testimony because it would prejudice their interests, we are at a loss to see any ground on which the plaintiffs can base an objection to it, as they will have an opportunity to cross-examine, and may thereby eviscerate the facts more fully than can be done by a discovery in an answer, and the fact that their answer to a cross-bill would not be evidence against the plaintiff shows the propriety of taking their depositions, for otherwise the facts within their knowledge, which it is alleged are material, cannot be made evidence so as to affect the plaintiffs.

Our attention was called to the form of the usual affidavits in such cases, where it is set out that the party whom it is proposed to examine is "not concerned in interest." The words are explained in *Maitland v. Williams,* 36 N. C., at p. 106: "It will be a good exception (at the hearing) that the witness has an interest in the matters examined to; and if this appears, his deposition cannot be read. *Now the interest which forms the subject of exception to a witness always means an interest adverse to the exceptant. It would be a singular objection to the reception of testimony that he who testifies has an interest which may bias him in favor of the objector.*" In our case it is a singular objection for the plaintiffs to make—that Sarah Pope and Barbara Goodwin are concerned in interest with them and may be under a bias against the trustees of the university at whose instance they are to be examined against their own interest! In England, a defendant may now be examined on the side of his interest. 6 and 7 Victoria, chap. 85, sec. 1, provides "that in courts of equity, any defendant may be examined as a witness, saving just exceptions, and that any interest he may have shall not be deemed a just exception to his testimony, but shall only be (69) considered as affecting or tending to affect his credit," showing that the words "not concerned in interest" are used in the sense of interest on the side of the party who seeks to have his deposition taken. Adams Equity, 365.

PER CURIAM. Decretal order affirmed.

ABNER FEIMSTER, EXECUTOR, v. THOMAS TUCKER ET ALS.

1. Where a testator willed that four slaves, a husband and his wife and their children, should be *freed*, and directed that they should be under the especial care of one of his sons, and bequeathed to the husband things that could not be carried out of the State with any convenience or profit, it was *Held* to be the intention that they should remain in the State, but that such of them as were over 50 years of age, and could show meritorious services, might be emancipated under section 49, chapter 107 of the Revised Code.
2. Where it appeared from the fact of a will that certain slaves directed to be emancipated (ineffectually) were not intended to be included in a clause bequeathing a residue, it was *Held* that such slaves would go to the next of kin as property undisposed of by the will.

CAUSE removed from the Court of Equity of IREDELL.

This bill is filed by the executor of William Feimster, praying for advice and direction from the court in relation to his duty in executing the trusts, and paying the legacies declared in the will of the said William Feimster. The second clause in the said will is as follows: "I will and bequeath to my beloved wife, Jerusha, the use of the following property as long as she remains a widow or lives in the county of Iredell; and at her death, marriage, or removal from the county of Iredell, then my will is that the property herein so left shall return to my estate and be be disposed of by my executor as hereinafter directed, . . . my negro
(70) man January, and Esther, also my negro man Lindsey and his wife Lucy and her two youngest children, Lindsey Walton and Louisa."

"Fourth. My negro man Lindsey and his wife Lucy and their two youngest children, Lindsey Walton and Louisa, at the death, marriage, or removal of my wife out of the county of Iredell, then my will is, and till not then, that each and every one of them be freed by my executor under the especial care of my son Abner. I now give and bequeath to my servant Lindsey one-half of my smith tools, my rifle gun and shot bag, subject, nevertheless, to the use of my wife as long as they live together, as this my will hereafter directs."

"Sixteenth. I will and desire that all of my estate, both real and personal, not herein bequeathed shall be sold by my executor on a credit of one year, and after discharging all my just debts and funeral charges, all my moneys from debts due me and sales here authorized, after discharging the several devises above named, my will is that the remainder be equally divided between my wife and my sons Elon and Abner and the heirs at law of John Morrison and John Feimster, deceased."

"Seventeenth. I will and devise that all the property left to the use of my wife that is not herein otherwise directed be sold by my executors at the death, marriage, or removal out of the county of my wife, on a

credit of one year, and proceeds of the same be equally divided between my sons Elon and Abner, the heirs at law of John Feimster, deceased, and John Morrison, deceased."

The bill alleges that the testator's widow, Jerusha, had lately died, and that there were several slaves descended from the female Louisa above mentioned.

The questions propounded on the foregoing will were, whether the slaves Lindsey, Lucy, Lindsey Walton, and Louisa, and the children of the last mentioned, born since the death of the testator, were entitled to the boon of freedom intended for them by the testator. Two of them, Lindsey and his wife Lucy, are stated in the bill to be over 50 years old, and that they were faithful, obedient and trustworthy, and rendered meritorious services, both to the testator and his late widow, (71) and they submit whether, if the provision in favor of the slaves be void, from the intention that they shall remain, they may not still be liberated under section 49 of the act of Assembly, Rev. Code, chap. 107. Also, whether if the said slaves be not entitled to their freedom under this will, they are to be considered as falling into the residuary fund provided in the sixteenth clause of the will; and if not, whether they can be considered as falling into that under the seventeenth clause, or whether they are undisposed of by the will and to be divided under the statute of distributions. Again, they ask to be directed and instructed whether the divisions made among the legatees mentioned in the sixteenth and seventeenth clauses are to be *per capita* or *per stirpes.*

The several legatees and next of kin are made parties, and the cause was set down for hearing on the bill, answer, and exhibits and transmitted.

Mitchell for plaintiff.
Sharpe for defendant.

BATTLE, J. If the testator had, by the fourth clause of his will, directed simply that the slaves therein mentioned should, at the death, etc., of his wife, be "freed" by his executors, then it would have been their duty to see that the wish of their testator should be carried into effect at the expense of his estate in one or other of the modes prescribed, sections 46 and 47, chapter 107, Revised Code. See *Hogg v. Capehart,* decided at June Term, 1857, which is reported as a note to this case (*vide* Note.*) Such a provision for emancipation would not (72)

*THOMAS D. HOGG, EXECUTOR, v. GEORGE W. CAPEHART.

Where a testator directs in his will that his slaves shall be freed, it is the duty of the executor to see that the wish of the testator is carried into effect at the expense of his estate.

be contrary to the policy of our law, because, under it, the slaves would be removed from the State. In the present case there are expressions in the clause of the will under consideration which exclude the idea of a lawful emancipation because it indicates the intention of the testator that the slaves should remain in the State. The executors are required to "free" the slaves, but they are to be under the especial care of one of them, to wit, the testator's son Abner. The testator then gives to Lindsey, one of his slaves, who is the husband of another and the father of the remainder of those to whom he designed the boon of freedom, one-half of his blacksmith tools and his rifle gun and shot bag. These provisions, slight as they may be, show that the testator had no idea that Lindsey was to be carried out of the State to a distant country; and if he were not to be sent away, it is very certain that the testator did not intend to have his wife and children separated from him. See *Greene v. Lane,* 45 N. C., 102.

(73) We are satisfied, then, that the trust for the emancipation of these slaves is not such an one as can be carried into effect under the provisions of those sections of the chapter of the Revised Code to which we have referred; but as the slaves Lindsey and his wife Lucy are

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The hires of slaves ordered to be emancipated must be first applied to the expenses of their removal; and if they prove insufficient, the remainder must be paid out of the estate.

Slaves ordered by the will to be emancipated can elect to accept or reject the boon of freedom; and where children are concerned, their parents must elect for them until they are of age, and then they have an election themselves.

This cause came up by consent from the Court of Equity of Bertie.
The points are sufficiently presented in the opinion of the Court.

Badger and Winston, Jr., for plaintiff.
..... *for defendant.*

NASH, C. J. The bill is filed by the executor of James L. Bryan to obtain instructions as to how he shall carry into execution his will. James L. Bryan died in October, 1856, and in his will is this clause: "I give to my slaves their freedom." The bill asks instructions on several points. The first is, is it the duty of the executor to free the said slaves?

We are of opinion that it is; and that having undertaken to execute the will, he is bound to execute all the trusts which are not forbidden by the laws of the State. Here is a clear bequest to the slaves of their liberty. A bequest which is lawful. See *Thompson v. Newlin,* 41 N. C., 384; *Thomas v. Palmer,* 54 N. C., 249; *Thompson v. Newlin,* 43 N. C., 32.

Second. The next question is, If he is bound to emancipate the slaves, where must he carry them to? and with what funds? In *Thompson v. Newlin, supra,* it was decided by a majority of the Court that, under a devise for emancipation, the executor could emancipate by sending them to a free State, where they would be free, and was not obliged to emancipate them under the act then in force. The opinion was not unanimous, for when the case was before the Court previously (41 N. C., 384) a dissenting opinion was filed. A doubt, therefore, rested upon the question. By the act of 1856, Revised Code, ch. 107, sec.

above the age of 50 years, they may be emancipated by virtue of section 49 of the same chapter, if the executor can prove meritorious services and will otherwise comply with the requirements of that section.

As most of the slaves in controversy cannot be emancipated in any way, a question arises whether they fall into the residuum of the testator's estate and pass under the sixteenth and seventeenth clauses of his will to the legatees therein named. They certainly are not mentioned in the sixteenth clause, because the residue therein embraced is expressly directed to be divided among certain legatees, of whom the testator's wife is one, whereas the slaves had been by a previous clause given expressly to the wife for life or widowhood, or, at all events, during her residence in the county of Iredell. It is clear, too, as we (74) think, that the residue given by the seventeenth clause is also a special one and cannot have the effect to dispose of these slaves. The clause directs that all the property left to the use of the testator's wife that is not "otherwise directed" be sold by the executors at the wife's death, marriage, or removal out of the county, on a credit of twelve months, and the proceeds divided, etc. Now it is quite certain that the testator did not intend that the slaves whom he wished to set free—and two of whom may yet be set free—should be sold at the very moment when their freedom was to accrue. There were many other articles of property upon which the clause could operate, as to which no other direction was given, leaving the slaves unaffected, because as to them

47, this doubt is removed, for it enacts: "Whenever it shall be directed by a testator that any of his slaves shall be emancipated and carried to any State, Territory, or country, and it may not be convenient to carry them to the place specially appointed, the Court shall designate and prescribe to what other place the slaves shall be carried, or for emancipation." By this section, the executor is authorized to send the slaves before emancipation here, to the State or country appointed by the testator, or, in the absence of such designation by him, to such State or country as the proper Court shall direct. Under this act there is no difference of opinion as to the construction. It is the policy of the State that when slaves are emancipated they shall be sent to the place from whence a return to this State is the least likely. In pursuance of this policy, we appoint Liberia as the country to which the executor shall send the slaves.

The third question is as to their hires. The hires of the slaves will constitute a fund for paying the expenses of their removal; and if it shall prove insufficient, the deficiency must be furnished out of the fund contained in the residuary clause.

To the fourth question, we answer that liberty cannot be forced upon any of the slaves who are of age to choose for themselves. If any of them refuse to accept their freedom, the bequest of liberty as to them fails and they remain slaves and sink into the residuum.

A commissioner must be appointed to ascertain from the adult slaves who are willing to go to Liberia and who are not; and if there are children under the age of 14, their parents must elect for them. If there are any who have no parents, or whose parents elect for them not to go, they must have liberty, on coming of age, to make their election. *Cox v. Williams*, 39 N. C., 15.

PER CURIAM. Decree accordingly.

there was another direction given. See *Lea v. Brown,* 56 N. C., 141, in which most of the cases on the subject are referred to, and the principles upon which they were decided discussed and explained. It follows that as the slaves in controversy have not been effectually disposed of by the will they belong to the next of kin of the testator and must be divided among them according to the statute of distributions.

The division of the proceeds of the property other than the slaves directed to be sold by the executors under the sixteenth and seventeenth clauses must be *per capita* and not *per stirpes,* as there is nothing in the will to take it out of the general rule. See *Roper v. Roper, ante,* 16, where the authorities upon the subject are referred to and discussed.

PER CURIAM. Decree accordingly.

Cited: Burgin v. Patterson, post, 427; *Clark v. Bell,* 59 N. C., 273.

(75)

SOPHIA M. PALMER, BY HER NEXT FRIEND, v. HENRY M. GILES.*

1. A stipulation in a deed of trust giving a preference to such of the creditors as will, on receiving one-half of their debts, release the other half makes it fraudulent and void.
2. All persons attempted to be secured in a deed of trust, fraudulent on its face, who claim a benefit under it become *participet criminis* and are precluded from such benefit.
3. A purchaser, even for a full consideration, under a deed fraudulent on its face gets no title.
4. Whether a deed which is void on account of fraud in respect to some of the trusts not apparent on its face may not, *under certain circumstances,* be valid to pass the title—*quere.*

CAUSE removed from the Court of Equity of ORANGE.

The main question in this case arises upon the construction of a deed of trust made by James M. Palmer to secure certain creditors therein named. The deed conveys to the trustee, N. J. Palmer, several tracts of land, town lots and personal chattels, among the rest the house and lot in the town of Hillsboro, which is the subject of this controversy, and provides that the same shall be sold on certain terms and the fund disposed of:

First. In the payment of debts in which he had given security.

Secondly. In the payment of a note of $100 due Thomas Lutterloh (and several other notes and accounts to persons named).

Thirdly. In payment of $500 to McIlvaine, Brownly & Co.

*This case is one of those decided at the last term and taken out by *Judge Ruffin* to draw the opinion, which he was prevented by indisposition from doing.

Fourthly, and lastly, to pay the debts due from the said James M. Palmer to Drummond and Wyche and others, enumerating some twenty other creditors.

In a subsequent clause of this deed, it provides as follows: "And if there shall be a balance, it is to be applied to the payment of the debts due in the cities of Petersburg, Baltimore, and Philadel- (76) phia and elsewhere, named in the fourth class; and if there shall not be a sufficiency to pay the same in full, they are to be scaled and paid *pro rata,* or in equal proportion, according to their amount, including interest to the time of the execution of the deed, any one or more of them giving in a discharge upon the payment of 50 cents of their debts, to be preferred in this class; and if it should happen, which is not anticipated, there should not be a sufficiency to pay all the debts in the first class, they are to be scaled in like manner."

Under this deed of trust the house and lot in question were sold and conveyed by the trustee to one Thomas Lutterloh at its full value, and the money paid by him to the trustee. Lutterloh, who was the father of Mrs. Palmer, in order to provide a home for her and her children, three in number, conveyed the house and lot so purchased to the debtor, J. M. Palmer, in trust for their sole interest, benefit, and support. Afterwards the property in question was levied on and sold under a judgment and execution against J. M. Palmer as his property and a sheriff's deed made to the defendant Giles for the same. The purchaser, Giles, brought an action of ejectment to recover possession, treating the deed of trust as fraudulent and void, and recovered judgment upon the ground that the plaintiff was entitled to recover the legal estate, which the defendant in the execution had in the land, even though he held it as trustee, irrespective of the question of fraud attempted to be made by the parties. See *Giles v. Palmer,* 49 N. C., 386. This bill was filed to enjoin the plaintiff at law from enforcing the writ of possession issuing upon this recovery, and praying that the sheriff's deed may be surrendered for cancellation, and for general relief. The defendant answered, alleging the fraud on the face of the deed of trust in the particular above quoted.

Graham for plaintiff.
Fowle and Bailey for defendant.

PEARSON, C. J. At any time before creditors have obtained a (77) lien on his property, a debtor is allowed to make a preference and to devote his property to the satisfaction of one or more of his creditors to the entire exclusion of the others; and although a deed conveying the property to a trustee necessarily has the effect "to hinder

and delay creditors," still it is not considered fraudulent, provided it be made with a single eye to the honest exercise of this right of making a preference, and without any stipulation or intent that it shall inure in any way, either directly or indirectly, to the benefit of the debtor, for any such stipulation or intent, whether expressed in the deed or to be inferred from circumstances, "taints it with fraud." This Court has not, before the present case, been called on to decide whether a stipulation giving a preference to such of the creditors as will, on receiving one-half of their debt, execute a release as to the other half, falls within the application of the general principle. But from the numerous cases in which the principle has been stated and applied, among others, *Hafner v. Irwin,* 23 N. C., 496; *Kissam v. Edmondston,* 36 N. C., 180, it follows, as a matter of course, that a stipulation of this kind does fall within the prohibition of the principle, and does "taint the deed with fraud," because it is for the benefit of the debtor. Creditors are at liberty to make a composition, and upon receiving a part may release the residue, but a debtor is not at liberty to pervert his right to make a preference into a means of coercion or use it as a bribe whereby to secure a benefit for himself. Accordingly, we find it settled by many cases in our sister States, where the point was directly presented, that a stipulation of this kind vitiates a deed of trust. *Grover v. Wakeman,* 11 Wendall, 189; *Ingraham v. Wheeler,* 6 Conn., 297; *Atkinson v. Jordan,* 5 Hammond, 293; *Brown v. Knox,* 6 Miss., 302, and others cited on the argument. In short, it could not be held otherwise without running counter to the whole current of decisions in our reports and those of the other States in respect to deeds of trust.

(78) It was then insisted that by the deed under consideration, this stipulation is confined to the "fourth class" of creditors, and the deed may be void in respect to the trust declared in their favor, but remain valid as to the others. There is ground to contend that, by a proper construction, this stipulation extends also to the "first class" of creditors whose debts, if need be, are "to be scaled in like manner." But waiving this view of it, the stipulation being expressed in the face of the deed, the trustee and all the creditors, who are presumed to have accepted the deed by claiming to take benefit under it, are fixed with a complicity and concurrence as *particeps criminis* in this unlawful intent of the debtor to impose terms on some of the creditors and secure a benefit to himself, so that this fraudulent intent pervades the whole and spoils all—like one rotten egg broken into the same bowl with many good ones.

Whether a deed which is void on account of fraud in respect to some of the trusts declared may not under certain circumstances be valid to pass the title and support trusts declared in favor of other creditors is

a question of much difficulty and about which there is seemingly a conflict of the cases. See *Brannock v. Brannock,* 32 N. C., 428; *Hafner v. Irwin, supra.* For instance, suppose a debtor has a secret understanding with some of the creditors that he will insert their debts in the trust, provided they will only claim one-half and release the residue; or suppose the debtor, without the privity of the trustee or the creditors, inserts a feigned debt, with an intent that the supposed creditor shall draw the amount and hold it on a secret trust for him, does this avoid the deed *in toto?* On the argument of this case this was the point mainly discussed, but we are relieved from the necessity of deciding it, because the fact that the stipulation is set out in the face of the deed fixes the trustee and all the creditors claiming benefit under it with a concurrence in this unlawful intent, and thus makes the deed *in toto.* For this view of the case we are indebted to Judge Ruffin, who conferred with us as one of the Court at our last June term.

It was also insisted on the part of the plaintiffs that, admitting (79) a creditor might have treated the deed as void *in toto* as against the trustee and the creditors claiming under it, it was otherwise in respect to the plaintiffs, who claim under a purchaser at public sale made by the trustee for a full and valuable consideration and without notice of an alleged fraud.

We will not enter upon the question how far a purchaser from the trustee for valuable consideration and without notice may be entitled to protection in a case where the fraud does not appear on the face of the deed, but is an open question of fact for a jury, or is to be adjudged by the court upon the finding of a fraudulent intent by the jury upon the distinction pointed out in *Hardy v. Simpson,* 35 N. C., 132, because ours is a case of fraud, manifest on the deed, to be adjudged as matter of law by the court, and with which the jury has nothing to do. It is settled that a purchaser is presumed to know the contents of the deed under which he derives his title, and is fixed with notice of every condition, provision, stipulation, and other matter therein set out. So the person under whom the plaintiffs claim must be taken to have bought with full notice of the stipulation which makes this deed fraudulent as a matter of law, consequently they do not stand in this Court as innocent purchasers, but take the title tainted with fraud. Indeed, it was owing to the circumstance that the person to whom the title was assigned in trust for them happened to be the debtor and the defendant in the execution that this Court acquired jurisdiction, otherwise the alleged fraud was a subject fit for investigation in a court of law. *Giles v. Palmer,* 49 N. C., 386, and that circumstance does not at all affect the merits of the case.

PER CURIAM. Let the bill be dismissed.

Cited: London v. Parsley, 52 N. C., 318; *Calvert v. Williams,* 64 N. C., 169; *Cheatham v. Hawkins,* 76 N. C., 338; *Eigenbrun v. Smith,* 98 N. C., 215; *Blalock v. Mfg. Co.,* 110 N. C., 105.

(80)

ALFRED W. KLUTTS ET ALS. v. MARY A. L. KLUTTS.

Where one bid off land at the sale of a clerk and master in equity, and give his bond for the purchase money, but died before the sale was confirmed, it was *Held*, on the sale being afterwards confirmed, that his widow was entitled to dower in the land under the act of Assembly, Rev. Code, chap. 118, sec. 6, and that she had a right to have it disencumbered of the lien for the purchase money by the personal estate.

PETITION for the sale of real estate, removed to this Court by consent from the Court of Equity of ROWAN.

This is a petition for the sale of several tracts of land and town lots, filed by the heirs at law of Caleb Klutts and the widow, who joined them in respect of her right of dower. There was a decree for the sale, and the property all sold by the clerk and master of Rowan, who reported that the sales were for a full price, and the master's report stating that fact, accompanied with bonds taken by him, was confirmed. At a subsequent term a motion was made that the master collect and distribute the proceeds of the land among the petitioners. On this motion a question arose as to what proportion the widow is entitled in respect of her dower; also, whether she is entitled to such proportion in the money raised by the sale of two lots in Salisbury, which brought $4,713. These lots had been bid off by Mr. Klutts in his lifetime at a sale by the clerk and master of Rowan as the property of one Moses L. Brown, and bonds were given by him pursuant to the terms of the sale; but before the term to which the master was to report, he (Klutts) died. The sale, however, was confirmed afterwards and the money ordered to be collected and title made to the purchaser.

The widow of Caleb Klutts contends that she is entitled to dower in the equitable estate of her husband in the two town lots, which is opposed by the heirs at law, and in this state the cause is brought to this Court.

Fleming for heirs at law.
Boyden for widow.

(81) MANLY, J. This is a petition filed by the heirs at law of Caleb Klutts against the widow, praying for a sale of lands in order

to allot dower and make division among the said heirs to the best advantage. The question is, whether the purchaser of real estate at a master's sale, who gives bond for the purchase money and dies before the sale is reported to or confirmed by the court, is seized of such an equitable estate as will entitle his widow to dower. It seems the court, after the death, confirmed the sale, and the case now awaits the collection of the purchase money and the making of title.

The case of *Thompson v. Thompson,* 46 N. C., 430, was that of a vendee in possession, with a bond for title, a part of the purchase money only being paid. It was there held the widow was entitled to dower.

That case seems to have turned upon the point whether the vendee had any equitable estate in the land, as distinguished from a mere right in equity, and with respect to that, we do not perceive any material difference between the cases. The sale in equity is conducted by the master under the order of the court. The biddings are public, the master accepts the last and highest, takes the bond or bonds of the purchaser and reports to the court. Such a sale, according to the ordinary course, is subject to the disapproval of the court, and subject also to the lien of the former owner until the purchase money is paid. It is nevertheless, as we think, a contract to sell which may be enforced in equity, and, therefore, in a court of equity, the land is considered the property of the vendee. He has an equitable estate in it subject to be defeated.

By recurring to the case of Thompson, it will be perceived that the equity of the vendee was not a simple or unmixed equity, but was encumbered with the superior equity of the vendor to have this purchase money paid. In that case, like the one before us, the estate of the vendee was subject to be defeated by the nonpayment of the money.

We do not attach any special importance to the other condition to which the contract of sale in this case was subject, to wit, the approval of the court. The power to set aside is not an arbitrary power, but is regulated by law. Our case is not encumbered by it, there- (82) fore, with any new principle. It only adds a condition whereby the vendee's equity may be defeated. It makes the vendee's equity a little more complex, but does not materially change its nature.

Upon the whole, we think the case depends upon the principles laid down in the case of Thompson, and that the defendant, the widow, had a right to have the lots in question disencumbered of the lien for the purchase money, and to have dower allotted therein as well as in the other lands set forth in the petition. It is also apparent to us that the interest of all parties, and especially the infant petitioners, has been promoted by the sale of the entire estate in the lands, and a division of

the proceeds may be made according to the respective interests of the parties.

PER CURIAM. Let a decree be drawn accordingly.

Cited: Caroon v. Cooper, 63 N. C., 388; *Love v. McClure,* 99 N. C., 294.

WILLIAM R. HOLT, EXECUTOR, ETC., ET ALS. v. PLEASANT H. HOGAN ET ALS.

1. Whether a will made by one having a power to appoint, which does not refer to the power nor notice specially, any of the property subject to it is an execution of such power. *Quere?*
2. Where a person having a power of appointment for the benefit of others used it for his own benefit, it was *Held* that such exercise of the power was entirely inoperative.
3. Where property was left by a will to testator's wife for life with power to distribute it among her children, and she did not exercise the power, there being no general residuary clause, it was *Held* that after the falling in of the life estate, the property passed to the distributees of the deceased under the statute.
4. Where a testator provided that one of his sons should be supported out of his estate while getting a profession, and charged his share with a certain sum with a view to that event, and such son declined of his own accord to study a profession, it was *Held* that he had no right to ask that his share should be discharged of that sum in the ascertainment of his proportion of the estate.

(83) CAUSE removed from the Court of Equity of RANDOLPH.

The bill is filed by the plaintiff as the executor of the will of William Hogan, praying a construction of certain clauses thereof and for advice as to the manner of carrying the same into effect. The clauses of the said will out of which the questions arise are as follows:

"First. I will and desire that all my just debts shall be paid, and that my estate shall remain in the hands and under the management of my beloved wife, Elizabeth Hogan, and my two sons, John A. Hogan and Alexander W. Hogan, until my youngest child arrive at the age of 18 years, except such legacies as are hereinafter named.

"Secondly. I give and bequeath to each of my children, namely, John A. Hogan, William L. Hogan, Franklin H. Hogan, Elizabeth J. Stone, Alexander W. Hogan, Pleasant H. Hogan, Louisa Holt, Claudia Hogan, Frances Hogan, Eugenia Hogan, and Julia Hogan, the sum of $3,000 each, and to my grandsons, William Jones, Nathaniel Jones, and John Jones, $1,000 each, which legacies are to be paid in money and property at its valuation and moneys which may be raised from the products

of my farms, out of which legacies are to be deducted the advancements I have already made to some of my children, which advancements are hereunto annexed and signed with my signature.

"Thirdly. I give and bequeath to my beloved wife, Elizabeth Hogan, the use of the manor plantation and land adjoining during her life, and one-half of all my personal estate that may be left after paying the above named legacies, and one-fifth part of all the marketable produce that may be raised on my mill plantation during her life, with the privilege of disposing of the same by will or otherwise amongst our children at her death.

"Fourthly. I will and direct that my son, Alexander W. Hogan, shall be supported out of my estate until he gets his profession, and afterwards, on the general division of my estate amongst my children, my sons John, William, and Alexander shall be charged each (84) with the sum of $1,000, to be deducted from each of their parts in said distribution.

"Fifthly. I also will and direct that my son Pleasant shall have the charge of my mill, and exercise the business at that farm as long as he and my executors herein named can agree, for which he shall have a decent support and the sum of $250, to be paid him annually by my executors. . . .

"Sixthly. I further will and direct that the aforesaid legacies of $1,000 each which I have willed to my grandsons William, Nathaniel, and John Jones shall be paid to them in negroes or land, or both, at the discretion of my executors, when they arrive at the age of 21 years."

In a paper referred to by the will as containing a list of advancements, the testator mentions that the sum of $1,200 advanced to his daughter Mary Jones was not to be deducted from the legacies to her three sons (William, Nathaniel, and John) "as they are not to have any more of my estate than $1,000 each."

Mrs. Hogan and her two sons, John and Alexander, were appointed executors, but the two latter having died she continued solely to manage the affairs of the estate for several years preceding her death, during which time she accumulated from the use of her life interest and the other sources provided in the will an estate of considerable value. She died in 1856 having made a will appointing the plaintiff W. R. Holt her executor, by which he became executor, also, of William Hogan's will. All the debts were paid off before her death, as also were the special legacies, with the exception of a part of that to Nathaniel Jones and the legacy of $1,000 to John Jones, who died before he reached the age of 21 years. The will of Mrs. Hogan, in its tenth clause, is as follows: "The residue of my property I will and desire to be sold by my executor, and the proceeds to be applied first to the payment of my

(85) aforesaid legacies, and the balance to be divided between Elizabeth J. Davis, Louisa A. Holt, Eugenia A. Minniss, the two children of A. W. Hogan, deceased, to wit, William G. Hogan and Jesse H. Hogan, and Pleasant Hogan, as follows, to wit: My son Pleasant H. Hogan, according to the compromise before alluded to between us, and to go into the hands of a trustee as above provided; to my daughters Elizabeth J. Davis, Eugenia A. Minniss, and Louisa A. Holt one share each, and to A. W. Hogan's children one share, they to represent their father."

Under the will of Colonel Hogan, especially the fifth clause as above stated, his son Pleasant claimed against his mother a large sum for support and his yearly salary in superintending the business of the mill and mill farm, which is charged on her interest, and was about to file a bill in equity for the same, but at the instance of mutual friends the dispute was compromised in writing and signed by each. In that compromise it is provided that Mrs. Hogan, "in making a division of her husband's estate, at her death shall allow to the said Pleasant twice as much as any other child." This is the compromise alluded to in Mrs. Hogan's will.

The primary question submitted by the plaintiff is whether the above will of Mrs. Hogan is a valid and effectual execution of the power contained in her husband's will, and if not, who are entitled, on the falling in of the estate, to the property left to Mrs. Hogan to be divided by her.

John Jones, one of the children of Mary, deceased, died several years before he arrived at 21; and another question submitted is, whether his share lapsed or whether it became payable to his administrator, and, if payable at all, whether it bears interest, and from what time, and whether, in the latter event, it may still be paid in property.

Alexander W. Hogan voluntarily declined studying a profession, and his support was no charge on the estate on that account. His administrator contends that the charge of $1,000 on his share made in his father's will on the supposition of his studying a profession ought not to stand against him in the settlement of the estate, and the executor asks advice also on this point.

(86) By another clause of the will of Mrs. Hogan she provides as follows:

"Seventh. I will and direct that the legacy, or the part of it unpaid, given by the will of my late husband, William Hogan, of which I am executrix, to Nathaniel Jones, my grandson, be paid out of lands in Alabama belonging to the estate of my deceased husband, and the balance, if any, after deducting advancements made, out of any estate I may have coming to me from the estate of my deceased son, Franklin

H. Hogan, and if I get nothing from his estate, or not sufficient, then out of any estate I may leave behind me."

Nathaniel Jones has been of age for several years, and in his answer insists that the executor of William Hogan is bound to pay him his legacy out of the estate, and that he is not bound to look to the uncertain provision attempted to be made in the will of his grandmother. Upon this point, also, the executor asks the advice of the court.

All the surviving children of William Hogan and the representatives of such as have died are made parties, also the administrator of John Jones, and they all answered, but their answers do not vary the statement as herein above set forth.

Morehead and Gorrell for plaintiff.
Fowle, Miller, and Kittrell for defendants.

PEARSON, C. J. 1. Under the third clause of the will of William Hogan, Mrs. Hogan took a life estate in the land and personal estate therein mentioned, with a power of appointment among the children at her death, but in the profits of this property and one-fifth of the produce of the mill plantation during her life she took an absolute interest, and was entitled to such portion thereof as she did not find it necessary to expend, and these "savings" pass under her will.

But her will is not an effectual exercise of the power of appointment. It does not refer to the power or purport to act under it. Nor does it mention specifically any of the property willed to her by (87) Colonel Hogan, but professes simply to dispose of her own estate, so that it may well be doubted whether, in this point of view, it could have effect as an exercise of the power. But if we suppose the reference made to the compromise between herself and her son Pleasant Hogan is sufficient to connect her will with the power, so as to show an intent thereby to exercise it, another difficulty is presented which we consider fatal. The compromise shows that, in order to relieve herself from a liability to Pleasant, which he was about to enforce by suit, she agreed so to exercise the power as to give him a double share; and in pursuance of that agreement, she does give him a double share. It is settled that a person having a power of appointment for the benefit of others is not at liberty to use it for his own benefit; and if he does so, it makes the exercise of the power entirely inoperative. Thus, if a parent has a power of appointment to such of his children as he may choose, he cannot appoint it to one of the children upon a bargain beforehand for his own benefit. Adams Eq., 185. The grounds upon which this doctrine is based are too obvious to require comment, and its application to the case under consideration is manifest.

The power not having been duly exercised, and there being no limitation over, in default of appointment, the question arises, who is entitled to this property upon the falling in of the life estate? There is no general residuary clause in the will of Colonel Hogan. In the seventh clause he directs the residue of his estate, both real and personal, to be equally divided amongst his children by his executors when the youngest child shall arrive at the age of 18 years, and thus by necessary implication excludes the property which he had given his wife for life, with a power of appointment by her among his children, for there is no connection between the time of his wife's death and the time when the youngest child should arrive at the age of 18. One might happen long before or after the other, consequently the property given to his wife cannot be included in that which he directs should be divided
(88) by his executors, and being undisposed of by his will passed to his distributees under the statute of distributions, the legal effect being that, by the will, Mrs. Hogan took a life estate, and the reversionary interest passed by act of law to the distributees, subject to be divested by the exercise of the power of appointment. It follows that Mrs. Hogan was entitled to a distributive share of this undisposed of fund, for the life estate given to her by the will does not exclude her from claiming her part of what is not embraced by the will. This interest and her "savings" from the profits of her life estate, and any other estate she may have owned, pass under her will. So it also follows that the three children of Mrs. Jones, a deceased daughter, are entitled to a share of this fund, for the words of exclusion, as to them, only have the effect of preventing any further claim by them under the will and do not embrace an interest as to which he died intestate. *Dunlap v. Ingram,* 57 N. C., 178.

2. The legacies of the sum of $1,000 to each of the three children of Mrs. Jones were vested, although not to be paid, until they respectively arrived at the age of 21 years; consequently, the administrator of John Jones is entitled to his legacy, but he is not entitled to interest except from the time when he would have arrived at age. His dying before that time does not entitle his representative to claim the money or interest on it sooner than he would have been entitled had he lived. There will be a decree against the executor for these legacies and interest, to be paid in money, for the discretion of the executor to pay in land or negroes ought to have been exercised at the time the legacies were payable, and the arrangements which Mrs. Hogan attempts to make in her will has no legal effect.

3. As Alexander Hogan, of his own accord, declined to study a profession, we can see no ground upon which he can take advantage of his own fault, or rather, his own pleasure, in order to free himself from a

charge which the testator annexed to his share of the estate. The cases cited by Mr. Miller do not support the position taken by him. If a legacy of $1,000 be given to one to be paid when he arrives at (89) age, and the interest is directed to be applied to his education, he is entitled to the interest, although he becomes a lunatic, because it was a direct gift to him with a mere direction as to its application, So if $100 is given for the nurture of A., and also $100 to bind him apprentice, and the executor neglects to bind him, A. is entitled to the $100 which ought to have been applied to putting him out as an apprentice, for it was the fault of the executor and not that of A. that he was not bound apprentice. *Barton v. Cooke,* 5 Ves., 461, which distinguishes from our case. Besides, there is not here any gift to Alexander, but only a direction that he shall be supported out of the estate until he gets his profession, with a charge of $1,000 upon his share and that of John and William. So the charge is positive, and the provision for his support was of course left for his election, and because he chose to disappoint the expectation of the testator by not studying a profession, *non constat,* that he thereby relieved himself of the charge. There must be a decree and reference conforming to this opinion.

PER CURIAM. Decree accordingly.

SARAH OLDHAM (*non compos*), BY HER GUARDIAN, v. YOUNG OLDHAM.

1. Where a son, living with his mother (a woman of weak intellect), having the management of her affairs and habitually controlling her conduct, used a bond that had been unfairly obtained from her without consideration, and which had been paid by others to him, as the means of obtaining from her a conveyance of a slave, it was *Held* that the deed was void, and that the court would compel its surrender for cancellation.

2. Where a deed was obtained by one standing in a confidential relation towards another of weak intellect, and the relation and imbecility continued from the time of the act till the bringing of a suit, to be relieved against the deed, it was *Held* that the statute of limitations, chap. 65, sec. 20, Rev. Code, did not avail the defendant.

CAUSE removed from the Court of Equity of CHATHAM. (90)

The bill was filed by Sarah Oldham, who had become insane, who sued by her guardian, Thomas D. Oldham, to compel the surrender of a bill of sale obtained from her by fraudulent pretense and by the exercise of undue influence. The substance and effect of the pleadings and proofs are so fully set out in the opinion of the Court that it is not deemed necessary or proper to make any other statement of them.

Phillips for plaintiff.
Haughton for defendant.

MANLY, J. The bill is filed to call in and cancel or declare null a bill of sale made by Sarah Oldham to her son, Young Oldham, for a slave named Brooks. The equity of the bill is placed on several grounds, viz., fiduciary relations between the parties, a want of consideration, imbecility of mind in the bargainor, and imposition. Whatever may be thought of these separately, it must be conceded they, altogether, make a clear case, if established, for the interference of the Court. The testimony was considered during the argument, and has since been reëxamined, and we find the material facts to be: That after the death of her husband in 1843, the complainant, then near 70 years of age and very feeble in body and mind, continued to live in the family residence with her youngest son, the defendant, as manager. On 20 September, 1843, the mother executed a bond to the son for $275, which he alleges was a debt due him from the deceased. On 12 April, 1848, she executed the bill of sale in question. The consideration inserted is $300, and the amount is credited on the bond. It also appears that a claim due defendant from the deceased was brought against the heirs at law and settled by a release to him of their undivided interest in the land where he was living. This deed of release was executed in 1844.

Without resorting to any questionable evidence, there is abundant proof that immediately before the death of her husband she under-
(91) went a marked change in body and mind, and from that time continued in a state of mental and physical decrepitude until finally, in 1857, she was declared *non compos mentis* by an inquisition of lunacy.

During this entire period the defendant exercised control over her personal habits and exclusive dominion in the management of their joint affairs, which shows that her will had become entirely subservient to his. If not actually incompetent at the execution of the bill of sale, she was certainly in a condition of mind easy to be imposed upon. The relations between them—of control on the one hand and absolute dependence on the other—were such as to make the task an easy one. Accordingly, we find that he uses a bond which had been procured from his mother immediately after the death of the father—a bond which had no consideration to support it—and uses it after its pretended consideration had been once paid and makes it the basis of the conveyance to him of the negro boy. It stands in a worse condition than a voluntary conveyance, which, under the circumstances, could not have been upheld, it is a conveyance procured by means of a fraudulent consideration.

It is worthy of remark in this connection, that the account which the subscribing witness gives of the execution of the paper and ceremony of conveyance, convinces us that it was not only an act of extreme embecility, but also of extreme reluctance.

We have not thought proper to notice questions of evidence brought before us by way of appeal from the commissioner, as the view we here take is irrespective of testimony excepted to.

Our conclusion, then, is that the bill of sale of 12 April, 1848, was procured by means of a false and fraudulent consideration—by a son who stood in a position of trust and confidence, and who possessed and exercised remarkable powers of control over a weak and feeble mother, and that this fraud and influence induced a reluctant consent to the forms of a conveyance which cannot be upheld in a court of equity. Authority for this conclusion upon the facts will be found in a number of recent cases in our own reports and in the cases there (92) cited. *Michael v. Michael,* 39 N. C., 367; *Ames v. Satterfield,* 40 N. C., 173; *Deaton v. Monroe,* 57 N. C., 39.

It will follow, as a clear legal deduction from the foregoing facts and conclusions, that the statute of limitations (Rev. Code, chap. 65, sec. 20), which the defendant sets up, cannot avail him. If the bill of sale be null for imbecility, influence, and fraud, it follows, as long as the influences and conditions subsist, the statute will not help the title. It has already been stated that the influences under which complainant was induced to execute the bill of sale continued until the unfortunate woman became entirely insane. There has been no period, therefore, subsequent to its date when its redelivery by the maker would have given it validity, and, therefore, *a fortiori,* mere inaction, could not have that effect.

PER CURIAM. Let a decree be drawn directing the bill of sale to be delivered up to be canceled and costs to be taxed against the defendant.

Cited: Whedbee v. Whedbee, post, 394.

EBENEZER EMMONS v. WILLIAM F. MCKESSON.

1. Where A., as principal, and B., as surety, gave a note on an executory contract for the purchase of real property, in which a fraud was practiced on A., it was *Held* that a bill filed by B. alone, praying for an injunction to stay an execution at law and setting up no other equity, is defective in substance.

2. It is irregular for a clerk and master, even by consent of counsel, to send up the original papers of a cause on an appeal from an interlocutory order or, by consent, to charge, in such a case, *as if* copies had been made and sent up.

APPEAL from an interlocutory order of the Court of Equity of WAKE, *Caldwell, J.*

(93) The plaintiff, the surety, and his son, Ebenezer Emmons, Jr., joined in a note to the defendant for the sum of $500 as the price of one-fourth of the defendant's mining interest in a certain copper mine in the county of Ashe, in this State, called the Maxwell mine, and at the time said note was given the defendant McKesson entered into a bond to convey to the said Ebenezer, Jr., one undivided fourth part of said interest. When the note became due the plaintiff and his son were absent from the State, and the defendant took out an attachment against them on account of said debt, and had one Samuel McD. Tate summoned as garnishee, and on his answer, the plaintiff not appearing to the suit, a judgment was rendered against them in the county court of Burke for the debt ($599.11), and execution issued thereon to the sheriff of Wake County.

The plaintiff in his bill alleges that McKesson represented himself as the entire owner of the mine; that this was not the truth, for that one Willis was the owner of one-half of it, and had been so declared by a decree of the court of equity of Burke County.

He also alleges that he was a citizen of Wake County at the time the attachment was taken out against him, and that he, the plaintiff, had no right to take out that process against him; also, that there was nothing levied on to sustain the attachment, for that Tate, the garnishee, did not admit that he owed plaintiff anything, and that for these reasons the judgment was irregular and void.

The prayer of the bill is for an injunction "commanding the sheriff of Wake to proceed no further under the said *fi. fa.*," and for general relief.

The injunction issued in vacation as prayed, and on the return of the same the defendant filed an answer denying all the allegations of fact stated in the bill upon which relief was asked.

On the coming in of the answer, the defendant's counsel moved for the dissolution of the injunction, which the court refused, and or-

(94) dered it to be continued to the hearing of the cause. From this order the defendant appealed.

Cantwell and Fowle for plaintiff.
E. G. Haywood and Miller for defendant.

PEARSON, C. J. There is error in the decretal order. The motion to dissolve the injunction ought to have been allowed.

1. The bill is fatally defective in substance, and the injunction was improvidently granted. The only object of the plaintiff seems to be to

have the defendant perpetually enjoined from issuing or enforcing execution on the judgment. What is to be done with the contract, in consideration of which the note was executed? Will a specific performance be hereafter asked for by the son of the plaintiff? Or will he seek to have the contract rescinded on the ground that it was obtained by false representations? These are matters about which the plaintiff supposes he has no concern; and yet it is entirely clear that his equity, if he has any, is a mere incident to the equity of his son, if he has any, and must be set up through or under him; consequently the son ought to have been made a party, with proper allegations to set up his as the primary equity, which would lay a foundation for an injunction as ancillary and in furtherance thereof. No precedent can be found for a bill like the present, where an injunction against an execution on a judgment at law is the only relief asked for and the original transaction is left open as a subject for future litigation.

In cases of injunctions to prevent torts, the plaintiff alleges a legal title and asks the interference of this Court on the ground of irreparable injury, so, of course, a perpetual injunction is the only relief asked for, but in all other cases of injunction the plaintiff alleges some primary equity as an equitable estate, which entitles him to call for a legal title or an equitable right which he is seeking to enforce, and the injunction is prayed for in aid of the primary equity, so as to prevent loss or damage or inconvenience until he has an opportunity to establish (95) it. This subject is explained in *Patterson v. Miller,* 57 N. C., 451.

2. If it is admitted that the judgment is irregular or void, that constitutes no equity. The plaintiff has a plain remedy at law to have the judgment set aside or vacated and the execution called in, on motion, in the court where it was rendered. *Lackay v. Curtis,* 41 N. C., 199, cited for the plaintiff, has no bearing on the question.

3. The answer is a fair, full and direct response to every allegation of the bill on which the supposed equity of the plaintiff is put, and must, at this stage of the proceedings, be taken to be true. No equity is confessed and no ground of exception can be taken to the answer.

4. We can see no reason why judgment should not be given on the injunction bond. It is true, the only surety to it is the son of the plaintiff, who ought to have been a party to the bill, but the plaintiff cannot be heard to object to the bond on that account. Nor is the position tenable that judgment cannot be rendered on the bond because the injunction was improvidently granted and the judgment at law, which is complained of, is void, for the statute is express and applies to all injunctions commanding the stay of an execution. Chap. 32, secs. 14 and 17, Rev. Code, provides, "Where an injunction shall be dissolved, judgment shall be rendered on the bond given on obtaining the same, in the same

manner as on appeal bonds." This point is noticed because it was discussed in the argument.

5. The original papers are sent to this Court instead of copies, and we find from the transcript that it was done by consent, with leave to the master to tax full costs. The practice cannot be allowed. The parties had no right to consent that the original papers should be taken out of the court below and sent up to this Court, for the papers were in the custody of the court and the parties had no control over them. Nor had the court below power, even with the consent of parties, to send up the original papers on an appeal from an interlocutory order, and
(96) thereby deprive itself of papers necessary to the original cause, which was still pending before it, and depend on this Court to send the papers back, whereby it would be left without any record or evidence to show how the proceeding was constituted before it. So that one court or the other must be without a case. The papers cannot be withdrawn from the office of this Court unless the master of the Court below files proper copies, *nunc pro tunc.*

We feel called on to add if, by the entry "with leave to the master to tax full costs," it be intended that he should tax costs as if copies had been made out and sent to this Court, such a proceeding cannot be sanctioned.

The court below will proceed accordingly.

PER CURIAM. Decretal order reversed.

Cited: Du Pre v. Williams, post, 102, 105.

CHRISTIANA DU PRE ET ALS. V. HENRY G. WILLIAMS ET AL.

Where the slave of A. was levied on under an execution against B., and there was no allegation of irreparable injury, nor of the pendency of a suit at law, nor of other equitable ingredient to distinguish the case from a simple *tort*, for which adequate reparation could be made by the recovery of damages at law, it was *Held* that a court of equity had no jurisdiction to enjoin a sale of the slave under the execution.

CAUSE transmitted from the Court of Equity of WAKE.

The bill alleges that Cornelius Du Pre and Daniel Du Pre, Jr., purchased of one Thomas Robeson a negro woman named Harriet and her child, Frances, for which they paid the money and took a bill of sale; that on 16 October, 1851, the said Cornelius and Daniel Du Pre, Jr., sold the said slaves and another, a child also of Harriet, to Daniel Du Pre, Sr., the father of the plaintiffs, Rachel and Altona, and of
(97) the said Cornelius and Daniel, Jr., and husband of plaintiff,

Christiana, and that the money was paid for the same by the said Daniel, Sr., and he took from them a conveyance for the same of that date; that the said Daniel, Sr., took the slaves into his possession and kept them, claiming them adversely to all other rights until September, 1856, when he conveyed them and another child of Harriet, named Virgil, to the plaintiffs Rachel and Altona, reserving a life estate in the same to himself and his wife, the plaintiff Christiana; and that he thence held them according to the terms of the said conveyance until his death, which took place in April, 1858; that since then the said slaves have remained in the possession of the mother and the two daughters, who have resided together and are still so residing; that a judgment was rendered at the December Term, 1858, of the county court of New Hanover against Cornelius Du Pre and Daniel Du Pre, Jr., and against the defendant John A. Baker in favor of defendant Henry G. Williams, on which a writ of *fieri facias* issued, directed to the sheriff of Wake County; that the said sheriff, at the instance of the said Williams and Baker, levied this execution on the four slaves above mentioned and took from the plaintiffs a bond for the forthcoming of them at a given day, when he avows his purpose to make sale of them according to the exigency of his writ.

The prayer of the bill is that the said Williams and Baker be enjoined from selling the slaves as threatened, and that the forthcoming bond may be surrendered for cancellation, and for general relief.

An injunction was issued in vacation, and at the return term the defendants demurred, generally, for the want of equity.

The cause, being set for argument on the demurrer, was sent to this Court.

B. F. Moore and Miller for plaintiffs.
E. G. Haywood, Fowle, and Cantwell for defendants.

PEARSON, C. J. A court of equity has no jurisdiction in respect (98) to torts except under peculiar circumstances where its interference is necessary in order to prevent "irreparable injury."

To justify the assumption of jurisdiction, it is not sufficient, as in matters of contract, that the remedy at law is inadequate. Nor is it sufficient that the wrong appended will, if not prevented, subject the party to "inconvenience and great expense, and put him to much trouble," for this would open too large a field and leave but little for the common-law courts. The wrong apprehended must be of such a nature as will cause irreparable injury in the proper sense of the word "irreparable," for that is the foundation of the jurisdiction, and the Chancellor interferes, not because there is any equitable ingredient involved in the case,

but to prevent a tort, the consequences of which could not be compensated for; for example, to prevent destructive waste, as cutting down ornamental or shade trees, or to stay ordinary waste in cutting timber, etc., where the party is unable to pay for it; to prevent a nuisance or the invasion of a copyright, and to prevent an article of personal property, where it has a peculiar value, as an ancient silver altar or a picture by some celebrated artist from being destroyed or defaced pending a suit concerning it, where there is reason to apprehend that the defendant will mash the altar or tear the picture or smear it with a brush. Adams Eq., 92. These cases, in respect to personal property, are reported in the English books, but it is remarkable how very few cases of the kind are to be met with in their reports, showing the extreme caution with which the jurisdiction is exercised. In our reports there are many cases respecting slaves where writs of injunction and sequestration have been granted at the instance of a remainderman against a tenant for life, or of those entitled to the ulterior estate against one having a determinable fee to prevent the slaves from being carried to "parts unknown," which is considered, in effect, a destruction of the property. This injunction, like that to prevent waste, is freely exercised where facts are
(99) stated to show a well-grounded apprehension that the slaves will be taken off, and in most of the cases there is an allegation of the insolvency of the defendant; that, however, we apprehend, is not necessary, for in these cases and those to prevent waste there is a "privity of estate" which creates a confidential relation and makes the way easy for the interference of a court of equity. But the cases in our books are very rare where the Court has interfered in order to prevent a naked trespass and the irreparable injury which would result should the wrongdoer carry the slave to "parts unknown." There can be no doubt, however, in respect to the jurisdiction, for the injury would be irreparable, and the removal of the slave to parts unknown would be, in effect, a destruction. We should without hesitation sustain an injunction or sequestration granted in aid of an action at law, either pending or about to be commenced for a naked trespass, if necessary to preserve the property and prevent it from being taken out of the country. The counsel for the plaintiffs were only able to find in our reports three cases in which they conceive the jurisdiction has been exercised. *Edwards v. Massey,* 8 N. C., 364, is in point. An action of detinue was pending for a slave. The defendant was a mere wrongdoer, and the aid of the court is asked on the ground that he was insolvent and intended to run the slave beyond the limits of the State; the injunction and sequestration were sustained. *Miller v. Washburn,* 25 N. C., 161, is not in point. An action at law by the administrator was pending, and the bill has an allegation that the defendants were men in slender circumstances

and intended to remove the slaves out of the State; but there was privity between the parties, and the court treats the bill as one for specific performance "to enforce an agreement as compromise a family dispute." *McNeely v. McNeely,* 45 N. C., 240, is not in point. The object was to prevent a trustee from selling the property after the trusts of the deed were satisfied, and for a reconveyance. So *Edwards v. Massey, supra,* is the only case in which our Court has interfered to prevent a naked trespass.

On the side of the defendant, two cases were relied on to show (100) that a court of equity has no jurisdiction in a case like the present, *Howel v. Howel,* 40 N. C., 258, is in point, and, in fact, is decisive of this case, being "all-fours" with it, except that here the object is to obstruct the execution of legal process, which makes this the stronger case against the interference of a court of equity. An old woman had been in possession of slaves for near twenty years under a legacy to her for life, remainder to her children, which had been assented to by the executor. She alleges that the executor had, by a false allegation, obtained an order of sale by an *ex parte* application to the county court, and was about to take the slaves from her and sell them. She avers that the injury to her would be irreparable. She is old and would hardly live long enough to recover damages at law for the trespass. Judges Ruffin and Nash, who were then on the bench, although aware that in several of our sister States the courts of equity had assumed jurisdiction to prevent a sale of slaves under such circumstances, were clearly of opinion that the jurisdiction could not be rightfully assumed—that it was in violation of a principle well settled by the English Courts, from which we derive our equity jurisprudence and so fully recognized by our courts and the legal profession of this State as not to require elaboration. Accordingly, in delivering the opinion, it was considered sufficient to say the injury was not irreparable; if the plaintiff died, her personal representative would recover the damages caused by a temporary loss in the possession and services of the slaves, and the conclusion is "the case presents the naked question, will a court of equity interfere to prevent a trespass where the damage is not irreparable? This Court has never claimed or exercised such a jurisdiction." *Smith v. Bank,* 57 N. C., 303, although not in point, affords a negative inference against the jurisdiction, for had such a jurisdiction been recognized it would have presented a plain ground on which to put the decision, whereas the Court justifies its jurisdiction on the particular circumstance that the legal title vested in the husband *jure mariti,* and as he (101) was the defendant in the execution an action at law could not be maintained, and the wife was, for that reason, forced to come into a court of equity for the protection of her separate estate.

We said above our case differs from *Howel v. Howel* in this, the object here is to obstruct the execution of legal process. That is a consideration entitled to much weight in every court. An execution is said to be "the end of the law," and yet if it can be interrupted either by an action at law or a bill in equity, it will only be the "beginning," and there will be no end of the law, for it is obvious every debtor who is hard pressed will be tempted to put his property in the hands of his children or other relatives, who may, when an execution issues, stop the sale and start a new suit. Accordingly, it is settled at common law that a writ of replevin will not lie by A. to take property out of the hands of the sheriff which he has seized under an execution against B. The execution must be brought to an end, and A. must bring some action which will not interrupt it. So, on the same principle, although the words of our statute in regard to the action of replevin are very general, and the purpose is to extend the application of the action, our Courts felt bound to put such a construction on it as to prevent an execution from being interrupted by it, although A. asserted that the property belonged to him and not to B., for it was considered more consonant to the administration of justice that he should suffer the inconvenience of a temporary loss of the services of the property for which he could recover compensation in damages rather than have the execution stopped. *Carroll v. Hussey,* 31 N. C., 89; *McLellan v. Oates,* 30 N. C., 387. The same principle applies with equal force to a court of equity, for equity does not conflict with the principles of law and will only enjoin a party from proceeding under an execution in cases where some equitable ingredient is involved; and where that is the case, even the debtor himself is entitled to an injunction. Let it not be said that as replevin does not lie, the party is without remedy at law, which gives him a stronger claim to the aid of a court of equity. That is a (102) fallacy. He is not without remedy at law. He may bring trespass, trover, or detinue, and if he will wait until the sheriff completes the execution by a sale, he may then bring replevin. So there is no pretext for applying to equity, except the temporary loss of the services of the property, which, as we have seen, is not an irreparable injury. After the sale, if the slaves are about to be removed out of the State, equity will interfere to protect the property during the pendency of the action at law to establish the legal title. In our case, if the bill had been properly framed and an allegation made that the defendants were acting collusively and were making use of the execution as a mere cover in order to get the slaves out of the possession of the plaintiffs, with an intent to run them out of the country, it may be that a court of equity would interfere on the ground that the defendants were perverting the process of the law, whereby to enable them to inflict an

irreparable injury on the plaintiffs; but there is no such allegation in the bill, and speculation in regard to a case presenting that view is not called for. Besides the want of this allegation, the bill is fatally defective in another respect—there is no averment that an action at law is pending or is about to be commenced. An injunction against selling under an execution is asked for, and there the matter is to stop. This is contrary to the course of the Court. *Patterson v. Miller,* 57 N. C., 451; *Emmons v. McKesson, ante,* 92. It is especially necessary, in a case like the present, for if the creditors are enjoined from having their execution levied and the negroes taken into possession by the sheriff, the party in possession will have no cause of action, and the creditors can institute no proceeding, either at law or in equity, because it is necessary that they should become purchasers at sheriff's sale before any title to this specific property will vest in them and put it in their power to treat the conveyance of the debtor as fraudulent. To meet this difficulty Mr. Moore suggested: "Let the sheriff levy and take the negroes into possession. That will subject him to an action by the party whose possession was interfered with. All we ask is that the prop- (103) erty shall not be sold, but be put back into our possession." Granted. Then it will be at your election whether to bring an action or not, and so the title, according to the frame of the bill, may never be tried.

Thus we may see some of the many difficulties that will grow up out of the jurisdiction which the Court is pressed now to assume and exercise for the first time. And for what? Only to prevent the owner of slaves from being exposed to a naked trespass whereby he may lose the services for a time and be put to the expense and trouble of hiring others, for all of which he will recover full damages at law.

If a court of equity should assume jurisdiction to prevent all torts, the damages resulting from which are as grievous as in this case, the field of its labor will become indefinitely enlarged.

This opinion has been more elaborated than would otherwise have been considered necessary because cases from several of the other States, where a jurisdiction to prevent torts by a sale of slaves has been assumed, were cited and pressed with much earnestness on the argument.

In South Carolina and Virginia the jurisdiction seems first to have been put "on the peculiar ties of affection by which master and slave are united. There is the faithful, kind old nurse who watched over your infancy with a tenderness and devotion little short of that which is felt by a mother, and who often supplied her place, whose value, estimated by the market price, would be merely nominal. There is your body servant who has faithfully watched over your sick bed, and who from experience knows and anticipates all of your wants," etc. *Young v.*

Burton, 1 McMullins Eq. (S. C.), 255. But it was found that the degree of affection entertained by a master for his slave, or by a slave for his master, was a subject, for the investigation of which a court was not adequate for the reason, among others, that by a rule of evidence the declarations of the party, as well of his slave, are not competent. It was then put on a broader ground: "Every argument in which the jurisdiction of the courts of equity to compel a performance of a
(104) contract in specie is founded is supposed to hold with equal force at least in favor of *retaining* a subject of property which another, having no title thereto, claims to arrest and dispose of by means of an execution, rather than turn the rightful owner around to seek an uncertain and inadequate reparation in damages." 3 Mumford, 565. It seems to us this reasoning is fallacious. *In regard to contracts,* every one is bound in conscience to do *specifically* what he agreed to do. So a court of equity, in respect to contracts to sell *land* and *slaves*—the two most valuable kinds of property—acts on the general rule to enforce a specific performance, while in respect to other contracts, unless some peculiar circumstance is alleged, equity declines to interfere—not on the ground that the party is not entitled to a specific performance, but because it is not necessary for the purpose of doing ample justice, "for if with the money an article of the same description can be bought in market—corn, cotton, etc.—the remedy at law is adequate (*Kitchen v. Herring,* 42 N. C., 190), while in regard to *torts,* equity, which is called a court of conscience, has, properly speaking, no concern, and they are left to be dealt with by the courts and juries at common law, except where the *tort* will be attended with irreparable injury, as distinguished from such as may be compensated for in damages.

In Tennessee the matter is put on a different footing and is made to depend on whether a clear title is made out by the proofs. "It is next insisted for the defendants that the complainant has not made out a case by his proofs, showing an undoubted and clear right of property in himself, and, therefore, must be left to litigate at law and before a jury his doubtful right. We think this argument sound, and that for this reason the decree of the Chancellor must be affirmed." *Loftin v. Espy,* 4 Yerger, 93. So the proofs are taken, cause set for hearing, and heard, and the bill dismissed on the ground that equity only has jurisdiction where an "undoubted and clear right of property" is shown by the plaintiff.

(105) In Alabama and Missisppi the Courts still seem to require, in reference to jurisdiction, as to specific performance, and also that to prevent *torts,* proof of some peculiar value or meritorious service or affection towards the slave, notwithstanding the difficulty of proof, and refuse to entertain jurisdiction in favor of negro traders.

Upon the whole, we can see no reason to feel dissatisfied with the doctrine established by our Courts—that is, to compel the specific performance of all contracts to sell slaves, and not to interfere to prevent torts, except such as threaten "irreparable injury," and only to do so then in aid of an action at law which is pending or about to be commenced, so as to take care of the property during the pendency of the suit.

The demurrer must be sustained and the bill dismissed with costs.

The motion for judgment on the injunction bond is not allowed. The defendants must take their remedy by action at law for a breach of the bond. This case differs from *Emmons v. McKesson, ante,* 92. There the injunction commands "a stay of the execution." Here it only enjoins the defendants from having the slaves sold under it, leaving them, however, at full liberty to take the benefit of the execution by having it levied on any other property the debtor may own.

PER CURIAM. Demurrer sustained.

(106)

JAMES E. TURNER ET ALS. v. SIDNEY L. EFORD ET ALS.

Where A. paid the purchase money for a tract of land, and had the title made to B., on a parol trust, to hold it for A., it was declared that such trust was not embraced in the statute of frauds. But where it appeared that the contract was made to defraud creditors, the court declined interfering to compel a conveyance of the legal title.

CAUSE removed from the Court of Equity of STANLY.

Thomas Turner, the ancestor of the plaintiff, having made a contract, in writing, with one Ward for the purchase of 100 acres of land, paid him the most of the purchase money for the same. Ward assigned the tract, out of which the 100 acres was to be taken, to one Daniel Freeman. Turner paid the remainder of the purchase money, and being anxious to purchase more of the said tract, he procured the defendant's ancestor, Solomon Eford, to act for him in the transaction. Accordingly, Turner bargained with Freeman for an additional quantity of the land, and got Eford to give his note for the whole, as well as that previously paid for, as the additional quantity agreed for, and Freeman made the title for the whole to Eford, amounting to 190 acres, Turner agreeing to make the payments as the same might fall due. Turner remained in possession of the land from the time of his contract with Ward. Solomon Eford died, and Freeman put the note in suit against his administrator and obtained judgment, which Turner paid off. Turner then demanded of the defendants, who are the heirs at law of Solomon Eford, that they should make title to him, which they refused, and having brought an action against the plaintiffs, who are the heirs

of Thomas Turner (he having in the meantime died), they obtained a judgment and took out a writ of possession, and were proceeding to have the same executed when this bill was filed to compel a conveyance of the legal estate, and for an injunction, and for general relief.

The defendants answered, setting up as a defense that the arrangement made by Thomas Turner with their ancestor, Solomon, was (107) done to hinder, delay and defraud the creditors of the said Thomas, and particularly one Edmund Smith, who had a judgment and execution against him and had actually levied on his interest in the said land. Replication and commissions.

There were proofs taken which, if believed, established the fraud alleged in the answer.

No counsel for plaintiffs.
Busbee for defendants.

PEARSON, C. J. The plaintiffs have established the allegations of their bill by proving that their ancestor made a valid contract for the land in controversy, paid all the purchase money, and had the title made to the ancestor of the defendants, upon a parol trust, to hold it for him. So they have brought the case within the principle established by *Cloninger v. Summit,* 55 N. C., 513, and *Cousins v. Wall,* 56 N. C., 43, and would be entitled to a decree but for the fact that it is proved fully that their ancestor procured the title to be made to the ancestor of the defendants with an intent to hinder, delay, and defraud creditors, among others, one Edmund Smith, who had an execution against their ancestor and actually had it levied on his interest in the land; and to evade it, he fraudulently had the title made to the ancestor of the defendants.

Upon this state of facts, it is a well-settled principle of this Court not to interfere so as to aid the party or those who claim under him to reap the fruits of his iniquitous dealing. "One must come into equity with clean hands."

This principle is fully recognized by *Pinckston v. Brown,* 56 N. C., 494; and that case is excepted out of its operation on the ground that an ignorant old woman, who was prevailed upon by her son (who had the management of her business and exercised great influence over her) to convey all her property to him, although she did so with an intent to defraud creditors, was not *in pari delicto* so as to have forfeited (108) the right to call upon the court for its aid. But special pains are taken to show the very peculiar grounds on which it was made an exception. No such grounds appear in this case. The bill must be dismissed, but without costs.

PER CURIAM. Bill dismissed.

Cited: Henderson v. McBee, 79 N. C., 221; *Shields v. Whitaker,* 82 N. C., 520; *Shermer v. Spear,* 92 N. C., 151; *Pittman v. Pittman,* 107 N. C., 162; *Summers v. Moore,* 113 N. C., 404; *Jones v. Emory,* 115 N. C., 165; *Bank v. Adrian,* 116 N. C., 539, 546; *Taylor v. McMillan,* 123 N. C., 393.

Dist.: Leggett v. Leggett, 88 N. C., 115.

ROBERT D. PASCHAL, ADMINISTRATOR, v. DAVID C. HALL AND JOHN W. PATILLO, EXECUTORS.

1. Where a wife insists that her husband made to her an actual gift of property, so as, in equity, to bind him and his personal representatives, she must show herself meritorious, and show, moreover, a clear intent on the part of the husband presently to divest himself of the property and to invest her with a separate estate therein, and that such provisions were reasonable.

2. Where a wife sold a slave belonging to her husband and took a bond for the price payable to him, which she collected and reinvested in the name of another as her agent, it was *Held* that the administrator of the husband was not barred by the statute of limitations until three years had elapsed from the time of a demand and refusal to account.

CAUSE removed from the Court of Equity of WARREN.

The bill is filed by the plaintiff as administrator, with the will annexed, of William Hagood, against the defendants, as the executors of Susan Hagood, his wife, praying a discovery as to a certain bond, or the proceeds thereof, which was taken for the sale of a negro slave, by the name of Frank, by the said Susan, and for the delivery of the said bond or the proceeds to him.

The answer admits that the testator of the defendants did effect a sale of the negro man Frank to one Watson, at the price of $753, and took a bond for the same in the lifetime of her husband, William Hagood, and payable to him; that she collected the money on the same and handed it over to William P. Rose to loan out for her; that Mr. Rose loaned the money to one Egerton, and took his bond for the same, payable to himself, and after the death of Mrs. Hagood, these de- (109) fendants collected of Rose, who had received it from Egerton, a part of the amount and took the latter's bond for the remainder, $500, which they say they still have on hand, believing it to belong to the estate of their testatrix. They say that William Hagood authorized and commissioned his wife to make the sale of the negro Frank, and to receive the proceeds for her own separate use and benefit, and that he gave it to her; that he did not claim the said bond or the money thereon arising in his lifetime, and in his will made no disposition thereof.

There are proofs filed in the case on both sides, which are so fully recited in the opinion of the Court that it is not deemed requisite to set them forth again. The defendants, besides the defense that the money for the slave was given to their testatrix, insisted on the statute of limitations. William Hagood died in January, 1855, and the plaintiff qualified in the following month. The defendants' testatrix died in January, 1858, and the defendants qualified at the next county court of Warren, which was in the next month. The bill was filed on 27 March, 1858, and the defendants contend that the cause of action accrued more than three years before the suit was instituted.

Eaton for plaintiff.
No counsel for defendants.

BATTLE, J. It is a well-settled doctrine of the courts of chancery, both in England and in this State, that a husband may make gifts or presents to his wife, which will be supported against himself and his representatives. *Lucas v. Lucas,* 1 Atk., 270; *Garner v. Garner,* 45 N. C., 1. But the courts will not sustain such donations unless they be proved by clear and incontestable evidence both as to the intention and the fact.

2 Story Eq. Jur., sec. 1375. In *Elliott v. Elliott,* 21 N. C., 63, (110) Ruffin, C. J., delivering the opinion of the Court, said: "As the contract is void in law, the case, in this Court, must always be that of an application to aid a defective conveyance. The wife cannot have that assistance unless she shows herself to be meritorious, and shows, further, a clear intention that what was done should have the effect of divesting the interest of the husband and of creating a separate estate for her, which she should have the immediate power to dispose of as she chose, and that the estate thus intended for her was but a reasonable provision. Hence, although the doctrine that equity will recognize such transactions under circumstances is laid down in the books, there are very few cases indeed in which a gift by the wife to her husband of her separate estate once well constituted, or a gift by the husband to the wife, have been made effectual. They almost all fail either from the extravagance of the gift or the insufficiency of the evidence to establish the intention of an actual gift by what was done." In another part of the opinion the learned judge remarked, "A father may wish to advance a child before marriage, but a husband seldom wishes to put his wife on an independent footing. He may perhaps do so, but it requires clear proof."

With the principles of evidence applicable to post-nuptial gifts thus clearly enunciated for our guidance, let us examine whether the alleged

gift by the plaintiff's intestate to his wife, the defendant's testatrix, of the price of the slave mentioned in the pleadings is sustained by the proofs.

The only direct testimony relied upon by the defendants to establish the gift is found in the deposition of Mrs. Walker. She states that William Hagood, the plaintiff's intestate, came to her house a short time before the sale of the slave, when she said to him: "I suppose you have sold Frank." To which he replied: "No, that he had not sold him, but his wife had." The witness says she then asked him "if he was not going to have the money for the said slave." He replied: "No; that it was his wife's, and that he did not want it." He further said that "his wife had the bond, or money, for the said sale." As corroborative of this testimony, the defendants rely upon the fol- (111) lowing receipt given by the wife to Edmund White, who was her son-in-law, and had assisted her in making sale of the slave:

"Received of Edmund White, one bond on William and John Watson for the sum of $753, payable to William Hagood, bearing interest from date, and dated 28 May, 1852. This 21 February, 1853.

"SUSAN (her × mark) HAGOOD.

"Test: JOHN C. JOHNSON."

The defendants rely also on the absence of proof that the intestate ever claimed the bond or the money due on it in his lifetime, or that he ever gave it in for taxation, and, further, that it is not mentioned or embraced in his will.

To rebut the evidence of this proof, the plaintiff refers to the deposition of William P. Rose, which states that Mrs. Hagood handed him a certain amount of money, through the hands of his wife, which he supposed was the proceeds of the slave in question, and asked him to lend it out for her, but not to let it be known whose money it was; that this was in the latter part of 1853; that he did lend it to James A. Egerton, and took therefor a bond payable to himself, and that he refused to tell Mr. Egerton more than that the money belonged to an old lady. He states further that he never thought about listing the money for taxation, and never paid any tax upon it. After the death of William Hagood he denied to his administrator that he had the money or any bond for it. The plaintiff relies, also, on the testimony of John Read, a justice of the peace, who says, when Mrs. Hagood came before him to give in her list of taxables in the year 1857, which was after the death of her husband, he asked her if she had any money at interest, to which she replied that she had not, and that "she was very poor and needy." Mr. Egerton states, in his deposition, that he did not know to whom the money which he borrowed belonged, but that since Mrs. Hagood's death he has taken up the bond he gave to Rose by giving

(112) to her executor another bond for $500, settling the residue with Mr. Rose.

Several witnesses testify that William Hagood and his wife lived unhappily together; that she was very cross, and she told one of the witnesses that she and her husband did not occupy the same bedchamber.

A careful consideration of all these proofs leads us to the conclusion that the alleged gift by the husband to the wife of the bond, or of the money paid on it, is not established by such clear proof of the fact and the intention as is required by a court of equity. Even the testimony of Mrs. Walker, supposing it were unaffected by any other proof in the cause, leaves us in doubt whether the plaintiff's intestate was not merely acquiescing in the usurped possession of the bond or money by his wife instead of acknowledging that he had made a free and voluntary donation of it to her. But when we reflect on the secrecy with which she kept and disposed of the money, and her denial on oath after the death of her husband that she had any at interest, we cannot reject the inference that she had obtained it unfairly and without the full knowledge and consent of her husband. The receipt which she gave for the bond to Edmund White proves nothing except that the possession was transferred from him to her. It was still her husband's property and left the question of a gift of it by him to her untouched.

The other circumstances relied on by the parties, respectively, are of not much importance. The burden of the proof was upon the wife, or those who represent her, and they have failed to satisfy us by such clear and incontrovertible evidence as the Court is bound to require that there ever was a free and voluntary gift of the bond or money by the husband to his wife.

But supposing the defendants have failed in their proofs, they insist that the plaintiff has a complete remedy at law, and cannot, therefore, maintain a suit against them in this Court; and if they can, that it is barred by the statute of limitations. The reply is, that Mrs. Hagood and her son-in-law, White, sold the slave as the agent of her hus-
(113) band; that White first, and she afterwards, held the bond in the same capacity; that she received the money and lent it out, through her agent, Rose, still as agent for her husband, and that he and his representative had a right to file a bill for a discovery and follow the fund, and, further, that the statute did not begin to run until a demand was made upon the agent.

If the inquiry made by the plaintiff of Rose, to know whether he did not have the money, is to be deemed a demand, still the statute is not a bar, because that inquiry was made in 1856, and the bill was filed in less than three years afterwards.

Our opinion is that none of the objections urged against the plaintiff's right to relief are available for the defendants, and he may, therefore, have a decree according to the prayer of his bill.

PER CURIAM. Decree accordingly.

Cited: *Warlick v. White,* 86 N. C., 141; *Walton v. Parish,* 95 N. C., 263.

JOSEPH THOMPSON v. HAYWOOD W. GUION ET ALS.

1. An allegation that a corporation was not properly organized, and, therefore, had no authority to collect a subscription made to its capital stock, is a question that can be tried in a court of law.
2. An allegation that a subscription to the stock of an incorporated railroad company was to be paid in work and materials, also that it was made upon a condition that the road was to be located on a particular site, are matters cognizable by a court of law.
3. Where the charter of a railroad company was altered after a subscription was made to its stock, so as to substitute one terminus for another, and done without the consent of the subscriber, it was *Held,* that having no power to go into a court of equity to enforce the original charter against the authority of the Legislature, he was exonerated from his subscription, and that he might make such defense in a court of law in a suit for the subscription.

APPEAL from an interlocutory order of the Court of Equity of (114) ROBESON, *Caldwell, J.*

The plaintiff in his bill alleges that the charter granted to the defendants authorizes them to construct a railroad from Wilmington or Smithville, or some point on the Wilmington and Manchester Railroad, in the county of Columbus, or some point on the Wilmington and Weldon Railroad, in the county of New Hanover, as the stockholders might determine, via Lumberton, Rockingham, Wadesboro, and Monroe, to the town of Charlotte, and thence to the town of Rutherfordton, taking the most feasible route between these places, to the stock of which he subscribed ten shares of $50 each, making a cash subscription of $500, on which he paid 5 per cent; that it is provided in the said charter that whenever the sum of $500,000 should be subscribed, and 5 per cent thereon paid, the subscribers should be incorporated into a company; that as soon as that sum should be subscribed, the commissioners taking the subscriptions should appoint a time for the stockholders to meet at Wadesboro; that they did so appoint, and a few persons met at the time and place designated, and it was reported to them that $500,000 had been subscribed according to the requirements of the charter, and 5 per cent thereon paid; that it was not true that $500,000 had been sub-

scribed, and that the required percentage had not been paid on the amount subscribed, for that of the subscriptions taken by the commissioners a large amount was by persons notoriously insolvent, and that, therefore, the said subscribers had no power to organize the company; that they did proceed, nevertheless, to appoint the defendants directors, and appointed one Daniel C. McIntyre an agent to solicit further subscriptions; that the said Daniel applied to the plaintiff, told him that if he would raise his subscription by taking twenty shares more no part of his subscription would be required in money, but that the whole would be received in work and materials for the construction of the road, and that he was also informed that the road would be located on the southwestern side of Lumber River, which he avers was the most feas-
(115) ible and advantageous route; that he was further informed that the directors had passed a resolution that no money would be required of him until $600,000 was subscribed in addition to what had been subscribed west of Charlotte, and $200,000 which had been promised to be subscribed by the town of Wilmington; in consequences of which assurances he did make a further subscription of twenty shares, amounting to $1,000, upon the express condition that no part thereof would be required to be paid in money; that he gave his note at the time of this subscription for the 5 per cent required to be paid by the charter, and he insists that, by the terms of the charter, the said subscription is void because such payment of 5 per cent was not paid in cash. The bill alleges, further, that the said road had been so located as to cross the Lumber River three times within a distance of 30 miles, and to run a great portion of that distance through deep, dense swamps and quagmires, whereas if it had been located on the southwestern side of that river it would have had to be crossed only once, and would have been upon a high, dry, level site. The bill further alleges that the defendants, or some of them, in concert with other persons, without the consent or concurrence of the plaintiff, and much to his inconvenience and detriment, in the year 1856, procured the Legislature to alter the terms of the act of incorporation so as to authorize the commencement of the road at any point on the west bank of the Cape Fear River, or at the town of Wilmington, and that in pursuance of the same the eastern terminus of the said road has been fixed at a place called Walker's Ferry, in which he has not acquiesced, and which deprives him of much of the benefit and advantage he had expected from the completion of the undertaking, and which formed the main consideration for his uniting in it. The bill further alleges that the additional subscriptions which he was assured would be made before any money would be collected of him have not been made.

The bill further states, that notwithstanding the promises and assurances made to the plaintiff as to the location of the road and as to the conditions on which the money would be required of him and (116) the mode in which subscriptions were to be discharged by him, and notwithstanding the material alteration made in the terms of the charter without his consent, the defendants have commenced a suit against the plaintiff in a court of law, in the name of the Wilmington, Charlotte, and Rutherfordton Railroad Company, on the note given by him for the 5 per cent of his subscription, and are threatening to enforce the whole of his two subscriptions, amounting to $1,500, by collecting the money.

The prayer is for an injunction to restrain the defendants from collecting or in any manner enforcing the subscriptions of the plaintiff, and for general relief.

The defendants demurred to the bill generally, and the cause coming on to be argued on the demurrer, his Honor ordered that the same be overruled, and the defendants answer. From this order the defendants appealed to this Court.

Kelly, Fowle, and William Mc. McKay for plaintiff.
Person for defendants.

BATTLE, J. No rule is better established than the one that a party cannot maintain a suit in equity for any injury done or threatened where the law affords him a full and adequate remedy. The inquiry in the present case, then, will be whether the allegations made by the plaintiff in his bill—all of which are admitted to be true by the demurrer—established a claim for relief which the courts of common law cannot completely and effectually give. In prosecuting this inquiry we will waive the objections which have been urged to the frame of the bill and assume that it is proper in form, correct as to parties, and suitable as to the relief sought. Giving to the plaintiff all these advantages—which is certainly as much as he has a right to ask and more than we are prepared, if it were necessary, to admit—we are decidedly of opinion that there is not one of his grounds of complaint upon which he could not have defended himself at law against any threatened wrong of the defendants. (117)

The first allegation is that the Wilmington, Charlotte, and Rutherfordton Railroad Company was never properly organized as a corporation, and, therefore, never had any power or authority to act as such. If that were true, then it could not, as a corporation, compel the plaintiff to pay his subscription, and he might avail himself of the defense at law. *R. R. v. Wright,* 50 N. C., 304.

The second allegation avers that when the plaintiff made his subscription the company, through its agent, expressly promised that payment of it should not be demanded in money, but that it might be paid in work and materials to be furnished by him for the construction of the road; and further, that his subscription was made upon the express condition that the road should be located along a certain designated route, from which the defendants had wrongfully departed. If there were a valid agreement for the payment of the plaintiff's subscription in work and materials, instead of money, we cannot perceive any reason why he may not plead it at law against any suit to recover the money. A corporation is as much bound by its contracts as a natural person, and cannot avoid or evade them either in law or equity. The same may be said with regard to the violation of any binding stipulation made with the plaintiff with regard to the route of the road. If the departure from the stipulated route were one not sanctioned by the charter, then, indeed, the plaintiff might come into a court of equity to enjoin the defendants from acting contrary to the provisions of the charter and to compel it to adopt the route therein prescribed. *Blackmore v. Glamorganshire Canal Navigation,* 6 Eng. Con., ch. 544; *Wiswall v. Plank Road,* 56 N. C., 183; *Norwich v. R. R.,* 30 Eng. & Eq., 144. In this case the bill is not framed for any such purpose, and there is no prayer that the defendants may be enjoined from locating and constructing the
(118) route through the swamps and across the bed of the Lumber River, as stated in the bill; but if it were in this respect properly drawn, the route described is not such an one as is not within the limits of the charter, and the plaintiff is, therefore, compelled to rely upon any defense which his own contract with the company may furnish; and that is one which, taking his own statement to be true, may be availed of at law.

But the most plausible allegation of the plaintiff is that the defendants, after his subscription had been made, procured from the Legislature an amendment to their charter, and, acting under it, had changed the eastern terminus of the road without his consent and against his wishes and to the great detriment of himself and others, who had made their subscriptions upon the faith that such terminus would be at one of the points specified in the original charter. Taking this to be true, the plaintiff is clearly released from his obligation to pay the amount of his subscription. He may well say *non haec in fedeva veni;* and as he has no power to enjoin the defendants in equity from doing what the Legislature has expressly authorized to be done, he may make his defense at law when called upon for payment. *Winter v. R. R.,* 11 Geo., 438; *Turnpike Co. v. Locke,* 8 Mass., 268; *Same v. Swan,* 10 Mass., 385; *R. R. v. Crowell,* 5 Hill (N. Y.), 386; *R. R. v. Leach,* 49 N. C., 340.

Our opinion, then, is that, upon the merits of his case, the plaintiff has failed to show himself entitled to any equity upon which to compel the defendants, or any of them, to answer his bill.

The demurrer must, therefore, be sustained and

PER CURIAM. Bill dismissed.

(119)

JEREMIAH ADDERTON ET ALS. v. BEVERLY SURRATT.

Where a petition for the sale of land, in a court of equity, described one tract as "the Mountain tract, containing about 100 acres," a sale was decreed, of the lands mentioned in the pleadings, and the sale confirmed, on a bill to set aside the master's deed on the ground of fraud, it was *Held* that it would require full incontestable proof to satisfy the court that *only a part* of the 100 acres had been intended to be sold by the master.

CAUSE removed from the Court of Equity of DAVIDSON.

In 1838, the plaintiffs, as the heirs at law of John Adderton, filed a petition in the court of equity of Davidson for the sale of his real estate consisting of various tracts; amongst others, one is described as *the mountain tract of about 100 acres.* The petition was heard and an order made at Spring Term, 1838, of the said court for the sale of the lands mentioned in the petition. The clerk and master in equity at the ensuing Fall term of the court reported that he had made sale of the lands mentioned in the petition to the "following persons," setting out the various tracts sold and the purchasers' names and the prices, amongst others, as follows: "Mountain tract—Beverly Surratt, $27." At this term a decree was passed setting aside the sale of a tract sold, called the Crump tract, and a release ordered and confirming the report of the clerk and master "as to the sale of all the other tracts of land mentioned in the pleadings." The bond taken by the master and returned with the report, in its conclusion, has this phrase: "It being for the purchase money for 40 acres of land sold as the property of John Adderton's heirs in order to make distribution among his heirs at law."

The Mountain tract aforesaid consisted of two parcels—one of 40 acres, which had been entered and granted by the State, and the other of 57 acres, bought of one Russell, adjoining each other. When the land was offered by the master, the defendant made known publicly that his deed covered the portion of 57 acres, and warned the bystanders against purchasing it. The master, on consultation with a friend conversant with such matters, proceeded to sell, and the defendant purchased whatever was sold as the Mountain tract. The plain- (120) tiffs say that only the 40 acres was bid off, and only that number of acres was paid for. The defendant says, on the other hand, that, finding the land going low, he concluded to buy in the Russell portion of the

Mountain tract as well as the other, so as to quiet his title to the 57 acres, and that he distinctly did so. In 1850 a motion was made in the court of equity of Davidson, praying that the case of the petition for the sale of the lands of John Adderton pending in 1838 might be brought forward, and on its being done, the defendant's counsel moved that the then clerk and master, on being satisfied that the purchase money had been paid to his predecessor, should make title to the defendant for the "Mountain tract of land mentioned in the petition," which order was accordingly made, and the deed made accordingly for the whole 97 acres. Previously to this the plaintiffs had brought an action of ejectment at law against the defendant for the 57 acres, which they alleged had not been sold, and finding, during the pendency of the suit, that the defendant had got the legal title from the clerk and master, they filed this bill to restrain him from setting it up in the trial of the said action, and praying that the deed thus obtained should be set aside upon the ground of fraud, and that it should be surrendered for cancellation and the defendant be allowed to take one only for the 40 acres which he had bought. The proofs in the case are contradictory, and from the view taken by the court unnecessary to be stated here.

B. F. Moore, Gorrell, and Kittrell for plaintiffs.
J. H. Bryan for defendant.

MANLY, J. This is a bill filed by certain persons who represent themselves to be the heirs of John Adderton, and who state that about the year 1838 they obtained from the court of equity of Davidson a decree for the sale of the lands theretofore belonging to John Adderton, (121) consisting of various parcels; that only a *portion* of a certain parcel called the *Mountain tract* was sold, and they complain that Beverly Surratt, who bought that part by fraud and management, had it reported as a sale generally of the Mountain tract; and afterwards, in 1850, procured, through an order of the court, a deed for the whole tract, and they pray that this deed may be revoked and canceled and a deed for the part only that was sold executed.

The facts appear to be that the Mountain tract was separated from the other lands of the deceased. It originally consisted of two parcels—40 acres acquired by purchase from Russell and 57 by grant from the State. They were adjoining each other, situated in the mountain district of the county, and designated, together, as the Mountain tract. In the petition for the sale it is set out as the *Mountain tract of about 100 acres.* It is reported by the master as sold to the defendant. The sales were confirmed by the court, except as to the Crump tract, which was resold, and afterwards, in 1850, upon proof of the payment of the pur-

chase money, the court of Davidson directed a title to be made. In the note given to the master by the defendant it is stated to be for 40 acres of land, and the evidence of witnesses present at the sale as to what was sold is conflicting.

Upon the merits of this controversy, we think the case is with the defendant. The conflicting evidence afforded by the contents of the note on the one hand and the report of the master on the other, and by the contradictory recollections of the bystanders, might leave the matter in doubt. But when you add the considerations that no attempt was made to resell the part alleged to have been left and no charge taken of it from that day to the time this dispute arose, and that it alone remained unsold of all the lands of the deceased, the conclusion is irresistible that it must have been considered by all parties as sold under the decree.

It seems to us the equity of the bill is overturned by force alone of the record of proceedings in 1838 upon the petition for the sale. It is "ordered that the Mountain tract of about 100 acres" be (122) sold. The master reports that he had sold the "Mountain tract" without qualification, and the sale is confirmed. Until that time the petitioners had a day in court to object and to rectify. After that the contract of sale is complete and valid.

The title follows the payment of the purchase money as a matter of course, the previous orders standing unreversed.

The equity of the bill, in any view of it, is unsustained by the proofs, and the bill must be dismissed with costs.

PER CURIAM. Bill dismissed.

G. M. KING ET AL. v. NATHANIEL GALLOWAY ET ALS.

A bill in equity cannot be sustained which seeks relief in relation to one article of property only belonging to the estate of a decedent, without calling for a general account and settlement of the estate and making all persons interested in the same parties to the suit.

APPEAL from an interlocutory order of the Court of Equity of BRUNSWICK.

The bill is filed for the sale of a slave by the name of Primus for the purpose of a division. It alleges that the slave, in 1809, was purchased by John Bell, Sr., who held him as his property until his death intestate in .....; that his widow and his two sons, John, Jr., and James, who were the only distributees, agreed to hold the property in the slave Primus as their own without administering on the estate of John Bell, Sr., and that they did so for many years; that James Bell then sold his interest to the defendant Nathaniel Galloway many years ago, and died, and John Bell, Jr., sold his interest also to defendant

(123) Galloway, and he and the widow Nancy held the slave jointly for several years, hiring him out and receiving the profits jointly, in proportion to their several rights; that in 1854 Nancy Bell, by deed, conveyed her interest to the plaintiff G. M. King, who, in 1859, conveyed his interest to the plaintiff Rufus Galloway; that Nancy Bell died in 1856. The bill alleges that John Bell, Jr., has taken administration on the estate of John Bell, Sr., and that this was done at the instance of the defendant Nathaniel Galloway to hinder and thwart the plaintiff in the recovery of his rights, and says such administration was totally unnecessary, as the estate was not in debt and the parties had long acquiesced in this private arrangement among themselves. John Bell, the younger, as administrator of John Bell, Sr., is made a party defendant, but the representative of Nancy Bell was not made a party, either as plaintiff or defendant.

The defendants demurred, and assigned as the cause of demurrer that the administrator of Nancy Bell was not made a party to the bill.

On the argument of the demurrer in the court below, his Honor overruled it and ordered the defendants to answer over, from which order the defendants were allowed to appeal to this Court.

E. G. Haywood for plaintiffs.
Baker for defendants.

BATTLE, J. We are clearly of opinion that the bill cannot be sustained, because it seeks relief in relation to one article of property only belonging to the estate of a decedent without calling for a general account and settlement of the estate. In *Baird v. Baird,* 21 N. C., 524, it was decided that one partner cannot demand an account in respect of particular items and a division of particular parts of the property, but the account must necessarily embrace everything connected with the partnership. The reason is obvious that it would otherwise be impossible to do complete justice between the partners. The same reason (124) applies with equal force with regard to the settlement of the estate of a deceased person. One of the next of kin, or the person claiming his interest, cannot call for a settlement with respect to a part of the assets only without having a full account of the whole estate; otherwise it cannot be seen what are the rights of the parties in relation to any particular part of the estate, and the administrator might be harrassed by a multiplicity of suits instead of having the respective interests of all the parties ascertained and adjusted in one only. To a bill for a general account and settlement of the estate of John Bell, Sr., the personal representative of his widow, as well as the next of kin or their representatives, would be necessary parties, and the necessity of

making them such cannot be avoided by filing a bill only for a partial settlement. The demurrer must be sustained and the bill dismissed; and in doing this, it is unnecessary for us to notice particularly the fact that one of the plaintiffs, to wit, G. M. King, does not seem, according to his own allegations, to have any interest in the subject-matter of the suit; on which account, also, the bill seems to be demurrable. See Edwards on Parties, 229; *Cuff v. Platell,* 4 Russ., 242; 3 Eng. Con. Ch., 651.

PER CURIAM. Bill dismissed.

WILLIAM HAYNES AND WIFE ET ALS. v. WILLIAM JOHNSON ET ALS.

In the descent of real estate, under the act of 1808, the next collateral relations of the person last seized, who are of equal degree, take *per stirpes* and not *per capita.*

APPEAL from the Court of Equity of RUTHERFORD, sent to this Court by consent of both parties.

On a petition filed by the heirs at law of William Johnson, de- (125) ceased, for a sale of his real estate, a decree was made, the land sold, and the money collected by the master, whereupon an order of reference was made for him to ascertain and report to the court "the names and number of the heirs at law of the late William Johnson entitled to partition in the real estate in the pleadings mentioned, and the amount coming to each," who reported that the said William died intestate, in the county of Rutherford, in 1856, without issue or lineal descendant, and that he had had one brother and three sisters, who all died in his lifetime, each leaving issue. The names of the brother and sisters were John, Martha, Amia, and Sarah. John had eight children, Martha three, Amia three, and Sarah three; that Milly, one of the children of Sarah, was dead, and left seven children. The master reported that the relatives of William Johnson were entitled to have a distribution of the fund *per stirpes;* that is, the children of each of the four (naming them) were entitled to a fourth among them, and that the children of Milly, the daughter of Sarah, were entitled to her share among them.

An exception was taken to the confirmation of the report by the children of John, who contended that the division should be made *per capita* among all the children of the four brethren of the said William equally. The court overruled the exception and ordered the report to be confirmed, from which order Willie Johnson and others, the children aforesaid of John, appealed to this Court.

Jones for appellants.
No counsel for appellees.

BATTLE, J. The facts of this case present the same question which was decided by this Court in *Clement v. Cauble,* 55 N. C., 82. In that case the decision was not unanimous, a dissenting opinion having been filed by the present Chief Justice; but since that time the rule of descents, of which it was a construction (see Rev. Stat., chap. 38, (126) Rule 3), has been reënacted in the Revised Code in precisely the same language (see Rev. Code, chap. 38, Rule 3). We must, therefore, consider the Legislature as having given its sanction to the construction which was adopted in the case above referred to, particularly as that case is inserted as a marginal reference to the rule in question by the commissioners of publication under the directions given them in section 9 of the act "Concerning the Revised Code." (See Rev. Code, chap. 121, sec. 9.) The decree made in the court below must be

PER CURIAM. Affirmed.

Cited: Johnston v. Chesson, 59 N. C., 147; *Cromartie v. Kemp,* 66 N. C., 384; *Crump v. Faucett,* 70 N. C., 347.

MARY JANE SUGG ET ALS. v. LEROY STOWE ET AL.

1. Where a party, who had covenanted to convey a tract of land, and given possession and taken bonds for the purchase money, got back the possession on a bill for a specific performance, it was *Held* that he was liable for profits he had made, or reasonably might have made, while in possession.

2. Where a party made a bond for title, and afterwards sold the land for an advanced price, and made title to another, so that he could not perform his contract specifically, it was *Held* that he was chargeable with the price received on the second sale, with interest.

CAUSE removed from the Court of Equity of GASTON.

The bill is filed to compel a specific performance of a contract, in writing, by the defendants Stowe to convey to the plaintiffs' ancestor, Levi W. Sugg, a tract of land described in the pleadings. The contract was entered into on 20 May, 1842, and bound the defendant Stowe to make title to the land in question whenever the said Sugg should pay to him $600; and to secure that sum, he took from Sugg three several bonds of $200 each, the first payable on 1 October, 1842, and the other two at one and two years thereafter. Sugg entered into posses- (127) sion and paid the first bond of $200 at maturity. He also made

a payment on the second bond of $100; and having died in 1844, no more of the purchase money has been paid. The plaintiffs are the children and heirs at law of Levi W. Sugg, and were all infants when their father died, and were still under age when this suit was brought. On the death of Sugg, one Grissom administered on his estate, and the estate being totally insolvent and there being no hope of the defendant's getting the remainder of his money out of that estate, it was arranged between Stowe and the said Grissom that the contract should be abandoned, on which Stowe, in 1846, took possession of the land and got possession of the bond for title. Stowe kept possession of the land until the year 1854, and then sold and conveyed it to the defendant Harrison for the sum of $650. Harrison, at the time of his purchase, had no knowledge of the plaintiffs' claim.

The defendant Stowe says in his answer that the land was greatly damaged by the mismanagement of the plaintiffs' ancestor and his widow by cutting down timber, permitting the fences to go down, and by bad cultivation, and that in order to make it bring the price he got for it he had to expend large sums in its restoration, and that having been obliged to take it back to save his debt, and considering the contract as having been abandoned, and having sold it *bona fide,* he cannot now specifically perform the contract. He relies on the length of time, also, as an abandonment of the plaintiffs' equity. Harrison answered that he had no notice of plaintiffs' equity.

There was replication to the defendants' answer and proofs taken, and the cause being set down for hearing was sent to this Court.

Fowle for plaintiffs.
Hoke and Jones for defendants.

PEARSON, C. J. *Cole v. Tyson,* 43 N. C., 170, is an authority directly in point to establish the equity of the plaintiffs as against the defendant Stowe to a decree for the specific performance of the con- (128) tract and to charge him with the profits he made, or might by reasonable diligence have made, during the time he was in possession, and also to subject him to the costs of the plaintiff.

Taylor v. Kelly, 56 N. C., 240, is an authority directly in point to establish the equity of the plaintiffs to follow the fund in the hands of Stowe and to charge him with the price he received for the land from the other defendant, Harrison, with interest, subject to a deduction for such part of the original purchase money which was not paid by Sugg, the ancestor of the plaintiffs. The administrator had no authority to surrender the title bond or to rescind the contract, and the infancy of the plaintiffs prevented any presumption of an abandonment of their

equity arising by the lapse of time after the death of their ancestor, *i. e.*, in 1844, until the filing of the bill.

In respect to the defendant Harrison, the bill must be dismissed, as he purchased of Stowe, who was in possession and is protected in the enjoyment of the land by the fact of being a purchaser for valuable consideration without notice of the equity of the plaintiffs.

Per Curiam. Decree for an account as against the defendant Stowe, with all costs, including those of the defendant Harrison.

Cited: White v. Butcher, 59 N. C., 234; *Few v. Whittington,* 72 N. C., 325; *Swepson v. Johnston,* 84 N. C., 454.

(129)

ALEXANDER McRAE et als. v. HAYWOOD W. GUION et als.

1. It is not an approved practice in a bill to pray that exhibits may be made a part thereof, but if a plaintiff choose to make them a part of his bill he cannot object (being ordered to pay costs) to their being copied as part of the bill served on the defendant, and his being charged with costs accordingly.
2. A clerk and master has a right to charge by the copy-sheet for copies of the bill which were issued to be served on the defendant.
3. A clerk and master has no right to charge for a seal on a *fi. fa.* issued to his county.
4. Where a bill was amended so as to make a corporation a party, it was *Held* to be proper to serve the president of the corporation with a copy of the bill, although he was already before the court in his individual capacity.
5. The clerk is only entitled to charge for one subpœna beyond the number necessary to be issued to the defendants (one for each defendant).
6. Where, on an appeal, the decretal order was in part reversed, the appellee was ordered to pay costs.

Rule upon the defendants to show cause why certain charges in a *fi. fa.* issued for costs in the case should not be struck out; heard before *Heath, J.,* at the last Fall Term of Bladen Court of Equity.

On a previous decree for costs against the plaintiffs in the cause, the *fieri facias* issued, which is the subject of this rule and the material contents of which appear from the following exceptions filed:

1. Because the exhibits referred to specially in the bill of complaint, as a part thereof, should have been filed in the office of the clerk and master, and no copies of them should have been issued to the defendants.

2. That copies of the bill are not chargeable by the office copy-sheet, being nothing more than a writ or process to bring defendants into court.

3. That if the bills are chargeable by the copy-sheet, the exhibits filed in the cause form no part of the bill and should not have been issued with the bill and subpœna or be charged in the bill of costs.

4. The plaintiffs further excepted to the bill of costs for that (130) the clerk and master charged $1.25 for issuing the *fi. fa.*—25 cents being for his official seal, though all the defendants in the execution resided in the county of Robeson.

5. That a copy of the original bill and exhibits had been served on Haywood W. Guion, one of the defendants, and afterwards, the bill being amended by making the Wilmington, Charlotte, and Rutherford Railroad Company a party defendant, the master issued another copy of the bill, as amended, with another copy of the exhibits to the same Haywood W. Guion, as president of the said company, charging the defendants in the execution again for bill and exhibits by the copy-sheet.

6. That the master charged for his seal upon each copy of the bill and subpœnas to each defendant, as well those in the county as those without.

It was admitted that the bill was allowed to be amended by making the corporation a party defendant and a copy with exhibits issued to the president.

The exceptions being overruled by the court, the plaintiffs appealed.

W. McL. McKay and Kelly for plaintiffs.
Person and Strange for defendants.

Battle, J. The first and main exception to the bill of costs, for which the execution issued, is that the exhibits referred to in the bill and prayed to be made a part thereof ought to have been filed in the office of the clerk and master and not made a part of the copy of the bill, which the law requires to be served upon the defendant, or on each defendant if there be more than one. See Revised Code, chap. 32, sec. 3, Rule 2. It is true that exhibits are not properly any part of the bill, and ought not to be so made. They are only proofs in the cause, and ought only to be referred to and prayed to be filed as such. 1 Dan. Ch. Pr., 420. But if the plaintiff choose to make them a part of (131) his bill, as was done in the present case, and as we are sorry to see is too generally the practice, we do not perceive any ground upon which he can object to paying for copies of them whenever he may for any cause be ordered to pay the costs. This exception is, therefore, overruled, and with it the third exception is disposed of.

The second exception is that the clerk and master has no right to charge by the copy-sheet for copies of the bill which he issued to be

served on the defendant or defendants. The counsel for the plaintiffs contend that the only fee to which the clerk and master is entitled under sec. 26, chap. 102, Rev. Code, is "for process, $1," but in this we think he is mistaken. The copies of the bill which are sent out to be served with a writ or subpœna have always been considered as "proceedings" for which, by the same section, the charge is 20 cents by the copy-sheet.

The fourth exception is sustained as to the charge for the seal to the writ of *fieri facias* issued to the sheriff of the county in which the clerk and master resided. Sec. 120, chap. 31, Rev. Code, expressly declares that "where the clerk of the Superior or county court issues precepts or process to the county of which he is clerk, he shall not annex the seal of the court thereto, and chap. 32, sec. 4, authorizes executions to be issued from a court of equity in the same manner as executions at law.

The fifth exception must be overruled, because, after the amendment of the bill, the service of the copy of it on the president of the railroad company was necessary for the purpose of making the corporation a party.

The sixth and last exception is overruled in part and sustained as to the residue of it. A seal is not necessary, as we have already said, to any process within the county, and there ought to have been but one subpœna more than the number of the defendants. All the subpœnas which are to be served on the defendants and left with them will be copies of the one which the officer retains, and upon which he is to make his return.

(132) The decretal order must be reversed in the particulars mentioned above and affirmed as to the residue. As the judgment has been in part reversed, the appellee must pay the costs of this Court.

PER CURIAM. Decretal order reversed in part.

STEPHEN CAULEY AND WIFE ET ALS. v. WINIFRED LAWSON.

1. An agreement between parties previously to, and in contemplation of, marriage, that neither, after the death of one of them, shall claim anything that had belonged to the other before marriage, was *Held sufficient in equity* to exclude the woman from dower, a year's provision, and a distributive share.

2. Where an object is sought to be obtained by a will, and several grounds are set out to show the plaintiffs' right to the relief sought, it was *Held* that the bill was not on that account multifarious.

CAUSE removed from the Court of Equity of LENOIR.

The bill is filed by the distributees of David W. Lawson against the defendant as his widow and administratrix.

The property consists of slaves and other effects to a large amount, and the plaintiffs claim that the whole of it is subject to distribution among them, discharged of any claim by her for a year's provision and a distributive share, and it alleges two grounds upon which she is not entitled; the first is, that on 11 November, 1852, immediately preceding the marriage and in contemplation thereof, the defendant, then a widow, and the intestate entered into marriage stipulations, under seal, in which it was mutually covenanted and agreed that on the death of either, each one was to resume the possession of the property he or she had originally owned, and was to take no interest whatever and set up no claim to any in the property of the decedent. The particular words of the contract relied on to exclude the claim of the (133) defendant in this respect is as follows: "And it is further agreed to and by the above afore named parties that the aforesaid Winifred Jones shall not claim, have power to hold or retain, any part or particle of the above property any longer than the above named parties may live together, but in case of the death of the said D. W. Lawson deliver up the above property and effects to his children, as the said Lawson may direct."

Another ground on which the plaintiffs say that the estate should be divided among them, exclusive of the marital claims of the defendant, is that she was never lawfully married to the intestate for that the person officiating at the ceremony was not duly qualified to solemnize the rights of matrimony.

The defendant answered, not varying the facts as set out in the bill. Replication. The main questions in the case are, whether the deed above set out is sufficient to exclude the defendant from a claim for her year's provision, for which she had filed a petition, and from a distributive share in her late husband's personal estate, and whether the two objections to those claims rendered the bill multifarious.

McRae for plaintiffs.
J. W. Bryan for defendant.

MANLY, J. The bill is filed by the next of kin and distributees of David W. Lawson against the widow, who is the administratrix of the deceased, praying for an account of the intestate's estate.

The principal difficulty presented by the pleadings arises upon the construction of the instrument of writing under date of 11 November, 1852, purporting to be an ante-nuptial agreement between the intestate Lawson and Winifred Jones—whether it be such a relinquishment of marriage rights to dower, distributive share, and year's provision as will be enforced in a court of equity.

(134) We think it is clearly so. The writing in question seems to be mutual covenants and agreements not to prefer a claim to any portion of the other's property or demand any benefit therefrom, excepting such enjoyment as they might jointly reap from it while they lived together. The covenants are mutual, and the one is a sufficient consideration to support the other. Mrs. Jones covenants that she will not claim, hold, or retain any part or particle of her husband's property any longer than they may live together, but in case of the death of the husband will deliver the whole up to his children as he shall direct, save only such as he may devise or bequeath to her.

The covenants extend to every claim of every sort which the defendant can set up to the real or personal estate of her husband as his widow. She is precluded, therefore, as we think, in this Court from dower, distributive share, or year's provision in her husband's estate.

Murphy v. Avery, 18 N. C., 25, is not in conflict with the opinion here expressed. That was a petition in a court of law for a year's provision, and the defense set up was an ante-nuptial agreement similar to the one in this case. It was there held that as the demand of the petitioner was a legal demand, and the covenants in the marriage settlement could not operate as a legal release, the petitioner was entitled to judgment. It is neither expressly nor by implication held that in equity the agreement would not be upheld and enforced.

The bill seeks an account and surrender of the entire estate not disposed of in a due course of administration, free from the claims of the widow, and this demand is placed upon two grounds: First, the ante-nuptial agreement referred to; and, secondly, the alleged fact that the parties were never lawfully married, and this is objected to as multifariousness.

There are not two distinct independent objects of equity jurisdiction sought to be attained in the bill. The object is an account of the intestate's estate according to certain principles, and the right to this account is placed upon two grounds—relinquishment and defective marriage. The grounds are not objects of the bill, but are introduced merely by way of directing attention to the reasons upon which the par-
(135) ticular equity of complainants rests. The bill is not multifarious.

We think the complainants are entitled to an account of intestate's estate according to the rights here declared.

PER CURIAM. Decree for an account.

Cited: Brooks v. Austin, 95 N. C., 477; *Perkins v. Brinkley,* 133 N. C., 88.

WILLIAM D. HARRINGTON v. MALCOLM A. McLEAN, EXECUTOR.

1. Where, by marriage articles, it was agreed that the wife should have the use of her slaves for life, and that they should then go to her children, it was *Held* that the husband of a daughter, who was the only child of the marriage, who became husband in the lifetime of his wife's mother, could not sue the executor of her father for the slaves in his own name, but must use the name of his wife jointly with his own.

2. *Webber v. Taylor, ante,* 36, as to the practice of this Court in remanding the cause for amendments after demurrer sustained, cited and approved.

CAUSE removed from the Court of Equity of HARNETT.

On 10 October, 1827, Neill McLean and Sarah McNeill, in contemplation of marriage between them, which was about to be solemnized, entered into a contract, in writing, in which was stipulated, among other things, as follows: "That the said Neill McLean doth covenant and bargain and agree that the said Sarah McNeill shall have and hold, to her own use, her two negroes, Robin and Sophia, and all of Sophia's increase, her lifetime, and the said Sarah McNeill's children shall have them after her; but if she shall have no child to live, then the said negroes to be his, to his own use forever."

The marriage took place as contemplated. The said Sarah had one child born of this marriage, to wit, Margaret Jane, who, in the lifetime of her father and mother, intermarried with the plaintiff, William D. Harrington.

The slaves in question, now amounting to ten, continued in the (136) possession of the husband until his death in 1858, and then went into the possession of his executor, the defendant, who holds them adversely to plaintiff's claim, and says that he intends to dispose of them according to the provisions of the will of Neill McLean, which will makes a disposition of them among the children of a former marriage, to the exclusion of plaintiff's wife.

The bill is filed in the name of Harrington alone against the executor of Neill McLean, praying for a surrender of the slaves, and for an account of the hires of the slaves since the death of Mrs. McLean. She died on 16 October, 1856.

The defendant demurred to the bill for want of equity generally, and the cause being set for argument on the demurrer was sent to this Court.

In this Court the counsel for the defendant assigns, *ore tenus,* other causes of demurrer, among others, that Margaret Jane, the wife of the plaintiff and only child of Sarah McLean (formerly McNeill) is not made a party to the suit.

W. McL. McKay and Leitch for plaintiff.
Buxton, Fowle, and Neill McKay for defendant.

BATTLE, J. The demurrer filed by the defendant to the plaintiff's bill is a general one for the want of equity, but his counsel now assigns *ore tenus* several causes, one of which is that the plaintiff's wife is not a party to the suit. She is the only child of the defendant's testator Neill McLean and his wife Sarah, and is, therefore, the only person to whom the slaves mentioned in the marriage settlement referred to in the pleadings are limited after the termination of the life estate reserved therein to her mother. The equity of the bill is to convert the defendant, as the representative of the testator, into a trustee of the slaves for the benefit of the plaintiff's wife, and in order to assert that equity she is a necessary party. It is true that she had married the plaintiff in the lifetime of her mother, and if the mother had had the legal estate
(137) for life in the slaves, then, upon her death, they would have devolved upon the husband of the daughter *jure mariti,* and he might have recovered them from the representative of the testator in his own name; but as the claim is an equitable one only it does not belong to the husband until he can reduce it into possession; and in doing that he must sue in the name of his wife jointly with his own. The case, in this respect, is similar to the claim of the wife to a legacy or a distributive share, a suit for which must always be in the name of the husband and wife. See *Arrington v. Yarborough,* 54 N. C., 72, where the subject is fully discussed and the reason upon which the rule is founded is stated and explained.

The demurrer must be sustained for the want of parties; but as the objection was not taken until the hearing, the bill will not be dismissed, but will be remanded for the purpose of being amended, the plaintiff paying the costs, as in case of a dismission, without prejudice. *Webber v. Taylor, ante,* 36.

In making this amendment as to parties, it will be well for the plaintiff to consider whether there ought not to be administration taken on the estate of Sarah McLean for the purpose of making her representative a party, as the marriage settlement was also made with her, and it is through that agreement the plaintiff's wife derives her equity.

PER CURIAM. Demurrer sustained.

(138)

SAMUEL S. WOODLEY v. SARAH GALLOP.

Where slaves were bequeathed to A. for life, and then to B., a daughter, a married woman, and, during the life of A., the husband of B. died, leaving a child of the marriage; B. then married again, and had another daughter, when she (B.) died, and her second husband also died (A., the life tenant, still living), it was *Held*, on the termination of the life estate, that the administrator of B. was the proper person to obtain the possession of her share of the slaves, but that he held the same in trust for the second husband's legatee, and that the daughter of the first marriage was entitled to no part of it.

CAUSE removed from the Court of Equity of WASHINGTON.

Dempsey Spruill, by his will, which took effect in 1842, bequeathed as follows: "Now my will and desire is that all my negroes, at the death of my wife, Mary Spruill, shall all come in together, of every description, and be equally divided among my lawful heirs, except my son, Downing Spruill." At the death of the testator, besides the son Downing above named, he left five children, William, Mary, Henrietta, Theresa, and Caroline, and on the death of Mrs. Spruill, which took place in 1858, and on petition of the children and their representatives a division was ordered, and the share of Theresa was delivered to the plaintiff as her administrator.

Theresa, whose share was the subject of this controversy, was married at the time of her father's death to one Plummer C. Dudley, who died in 1845, leaving one child, the plaintiff Elizabeth, the wife of the other plaintiff, Samuel S. Woodley. Dudley, the former husband of Theresa, did not in any way dispose of his wife's undivided share of these slaves. In the year 1848 the said Theresa again intermarried with one Joshua G. Gallop, who died in 1855, having made a last will and testament appointing the plaintiff Woodley executor to his will and testamentary guardian to his infant daughter Sarah, who is the defendant in this case, and to whom he gave all his estate by the said will.

The prayer of the bill is that the said slaves shall be divided (139) between the said Woodley and wife on the one hand and the defendant Sarah on the other.

Garrett for plaintiff.
H. A. Gilliam for defendant.

MANLY, J. By the will of Dempsey Spruill, admitted to probate in 1842, his estate in slaves is given to his wife for life, remainder to certain of his children, William, Mary, Henrietta, Theresa, and Caroline, subject to be divided among them after the determination of the life estate.

The widow and tenant for life is now recently dead, and the question presented for our decision is, Who is entitled to the share of Theresa? It seems that at the time of the death of her father this daughter was the wife of one Dudley. By this marriage she had issue, a daughter, Elizabeth. The husband, Dudley, died in 1845 without having in any way attempted to dispose of his wife's undivided interest in the slaves; and Mrs. Dudley again intermarried, in 1848, with Joshua Gallop, and had issue, Sarah, the defendant. Theresa died in 1853; her husband (Gallop) in 1855. The complainant Woodley, in 1858, intermarried with Elizabeth Dudley, the daughter of Theresa by the first marriage, and is the administrator of his mother-in-law and also the executor of the last husband (Gallop) and testamentary guardian of the daughter, Sarah. The point made upon this state of facts is whether the estate in this share of the slaves is distributable to the two daughters of Theresa Gallop, or whether it be held by her administrator in trust for the legatee of the surviving husband.

We regret that the fact of the wife's death prior to that of her last husband, and ignorance on his part, probably of the state of the law, must work in this case what will be deemed a hardship.

The rules are well settled by which this property belongs to the surviving husband's representative and legatee. Upon the death of the first husband it survived to the wife, Mrs. Dudley, and the right passed
(140) to her second *jure mariti*. This is settled by a train of decisions in our own Courts, and has been considered as settled ever since the case of *Poindexter v. Blackburn*, 36 N. C., 286, in which the previous cases are cited and approved. It continued a chose in action until after the death of the tenant for life, when it was rightfully taken possession of by the administrator of the wife, Theresa; but he held it in trust for the husband, who was entitled to it by virtue of his marriage, and now holds in consequence of the husband's death, in trust for his representative and legatee.

It will thus be perceived that the case turns upon the fact that the husband (Gallop) survived his wife and was entitled, under the rules of law, to her personal estate. The subject is discussed in 1 Roper Husband and Wife, 204-5 (32 L. L., 129-30), and we refer to it with the authorities there cited as the basis of this opinion.

PER CURIAM. Decree accordingly.

Cited: Colson v. Martin, 62 N. C., 126.

WILLIAM McRAE ET ALS. v. D. A. DAVIS, CASHIER, ET ALS.

Where it was alleged by the defendant, in an execution, that satisfaction had been made on a former execution issued on the same judgment, it was *Held* that a bill for an injunction to restrain the second execution was not the proper remedy, for that, at law, a motion on notice, in the nature of a writ of *audita querela* to call in the execution and have satisfaction entered of record, was the proper mode of redress.

APPEAL from an interlocutory order of the Court of Equity of MONTGOMERY dissolving an injunction; *Caldwell, J.*

D. A. Davis, as cashier of the branch of the Bank of Cape Fear, at Salisbury, obtained a judgment at law against William McRae, Calvin Cochran and others, upon which an execution issued di- (141) rected to the sheriff of Montgomery County, in which county all the defendants resided. The defendant Cochran was the sheriff of that county, and, as such, he proceeded to collect the money out of his codefendant, the principal in the execution, and did collect the whole sum out of him, but he appropriated the money to his own purposes and made no return of the execution. Execution again issued, and Cochran having gone out of office, his successor was about to make the money a second time out of McRae when he was restrained by the writ of injunction issued in this case.

On the coming in of the answer, the court ordered the injunction to be dissolved, and the plaintiff appealed.

J. H. Bryan for plaintiff.
Blackmer for defendant.

PEARSON, C. J. There is no error in the decretal order. The injunction was improvidently granted, and ought to have been dissolved on the ground that the bill discloses no equity.

The case turns upon the effect of a payment by McRae, the principal in the execution, to the sheriff, Calvin Cochran, who held the execution, and who was one of the defendants in the execution. Was this a satisfaction of the judgment? If it was, then the execution which afterwards issued, and in regard to which the injunction is granted, was, in law, of no force or effect, and the plaintiff had a plain remedy in the court from which it issued, by writ of *audita querela,* to have the execution called in and satisfaction entered on the record. The same thing could have been done upon notice and motion in the nature of an *audita querela,* which, in our practice, is substituted for the ancient judi- (142) cial writ issued by the court where the judgment was not purchased out of the court of chancery like an original writ. See Fitzherbert's *Natura Brevium.*

If the payment by McRae to Cochran was not a satisfaction, then, of course, the plaintiffs have no equity. So, taking it either way, the question—satisfaction or no satisfaction—was a dry question of law, and there is no equitable ingredient involved in it.

PER CURIAM. Decretal order affirmed.

GARY WILLIAMSON ET ALS. v. DEMPSEY WILLIAMSON ET ALS.

The act of 1844 (sec. 119, chap. 6, Rev. Code) declaring as of what time a will shall speak was *Held* to give no force to the subsequently passed act in regard to the increase of slaves (Rev. Code, chap. 119, sec. 27), so as to pass the increase of slaves under a will made before this latter act was passed, although the testator died after it went into effect.

PETITION to rehear this cause, which was decided at December Term, 1858 (57 N. C., 281).

The petitioners point out as erroneous that part of the decree which passed at the said term, in which it was declared that the increase of the slaves bequeathed to them in the third, fourth, and fifth clauses of the will of Thomas Williamson, which were born during the life of the said Thomas, did not pass to the petitioners, but fell under the residuary clause. They urge that it appears that Thomas Williamson died on 23 October, 1856, and that by sec. 6, chap. 119, Revised Code, it was declared that "Every will shall be construed with reference to the real and personal estate comprised therein, to speak and take effect as if
(143) it had been executed immediately before the death of the testator, unless a contrary intention shall appear by will"; and by section 27 of the same chapter, it is declared that "A bequest of a slave, with her increase, shall be construed to include all her children born before the testator's death, unless a contrary intention appear by the will."

They urge that the said will was signed and published on 26 August, 1852, and that there is nothing on the face of it that forbids it being construed as if it had been executed on 23 October, 1856, which was after the said section 27 went into effect.

Strong and Dortch for plaintiffs.
Miller, Lewis, and Fowle for defendants.

BATTLE, J. When this case was before us twelve months ago (57 N. C., 281), the effect which it has been since supposed that the act of 1844, chap. 88, sec. 3 (Rev. Code, chap. 119, sec. 6), ought to have had upon the construction of the will mentioned in the pleadings was not brought to our attention in the arguments then submitted. We have on

that account been gratified that the cause has been presented to us again upon a petition to rehear it, and that the question which was omitted to be raised on the former occasion has now been fully and ably argued by the counsel on both sides. Aided by the light which has been thrown upon the subject by these arguments, we think that we can show conclusively that the act of 1844 above referred to has no bearing upon this point in the case, and that, consequently, the former decision must stand.

The act of 1844, chap. 88, sec. 3, declared that "every will shall be construed with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." This act was held, in the case of *Battle v. Speight,* 31 N. C., 288, and again in *Williams v. Davis,* 34 N. C., 21, to (144) be prospective only in its operation, and not to affect the construction of any will made prior to the time when it went into effect, though the testator may have died afterwards. The reason given for the decision in the case first above mentioned was that the Legislature could not have intended to change the meaning and legal effect which the language of the will bore at the time of its inception. Hence the conclusion was that the act was intended to apply only to wills thereafter to be executed or published. Upon such after-made or published wills, it was manifest that the act of 1844 could not alter the rule of construction which had prevailed before (*Love v. Love,* 40 N. C., 201, and other cases); that in a bequest of a negro woman and her increase without any explanatory words, the legatee could not take a child of the woman born after the date of the will and before the testator's death. Indeed the act would seem to make the application of the rule clearer, because the will, speaking and taking effect immediately before the death of the testator, could not embrace any increase of a female slave born before that time.

Such being the operation of the act of 1844, if it have any operation upon the case at all, the counsel for the petitioners to rehear are necessarily forced to rely for the support of the construction for which they contend altogether upon the effect of the act contained in sec. 27, chap. 119, Rev. Code, which says that "a bequest of a slave, with her increase, shall be construed to include all her children born before the testator's death, unless a contrary intention appear by the will. Now, it will be seen that upon the first hearing of this cause we did consider the question of the effect of this enactment, and decided that it could not apply to the construction of the will under consideration, because it was made and published before the act went into operation. It is obvious that we could not have decided otherwise without a direct violation of the principle adopted by the Court in *Battle v. Speight* and reasserted in *Wil-*

liams v. Davis, to which we have heretofore referred. That principle is that a statute which purports to change a rule of construction
(145) then applicable to devises and bequests will not affect wills made before the time of its enactment, though the devisor or testator may not have died until afterwards.

PER CURIAM. Petition dismissed.

Cited: Rogers v. Brickhouse, post, 304; *Radford v. Elmore,* 84 N. C., 426.

TOWNSEND, ARNOLD & CO. v. E. H. MOSS AND R. A. MOSS.

1. Where an equity was established against the defendant for one of two lost notes, but which of them was not made to appear from the evidence, it was *Held,* the *onus* being on the plaintiff, he should take his recovery on the smaller.

2. Where one got another to sign a note, with an understanding that it was not to be binding unless signed by a third person also, and such person's signature was not procured, whether, on the notes being used to secure a preëxisting debt of the principal, the surety could avail himself of this breach of confidence. *Quere?*

CAUSE removed from the Court of Equity of MECKLENBURG.

The suit was brought to recover the value of two notes destroyed by fire. The plaintiffs were merchants in the city of New York, and sent two notes to S. W. Davis, Esq., an attorney living in Charlotte. The latter filled up a writ on the same against the defendants Moss and Ross for the amount of the two, consolidated, but before he could obtain judgment thereon his office and residence were destroyed by fire, and with it the notes in question.

The answer of Ross denies that he ever executed two notes as surety for Moss to plaintiffs. He admits he did execute one note for about the sum specified in each of the notes, they being nearly equal in amount, and that this was about the time the notes were dated, they bearing nearly the same date, but he says this was done upon the express understanding and agreement, both with E. H. Moss and one William
(146) Cooper, that he (Cooper) would sign the said bond as surety, but that the same was not done, and the note which he signed was put in use by Moss without Cooper's signature to it, by passing it to the plaintiffs for a debt which he had formerly contracted with them for merchandise.

The depositions of Cooper and Mr. Davis were taken as to the facts of the case, and their evidence is sufficiently apparent from the recital of his Honor, the Chief Justice, in delivering the opinion of the Court.

Osborne and Lowrie for plaintiffs.
Boyden and A. C. Williamson for defendants.

PEARSON, C. J. The defendant Ross admits he signed one of the notes, but alleges, by way of avoidance, that he left it in possession of Moss with the understanding that he was not to use it unless it was also executed by one Cooper as cosurety.

It may well be doubted whether this matter, if proven, would be sufficient in avoidance, for the reason that Moss was thereby enabled to procure from the plaintiff a surrender of his evidence of debt; and if loss follows from this breach of confidence, it should fall on the party who reposed the confidence rather than on an innocent third person. But the allegation is not proven by any competent evidence. Cooper, it is true, swears that he signed a note as surety for Moss and left it in his possession with an understanding that it was not to be used unless Ross executed it as cosurety; but this evidence does not establish the allegation of Ross in respect to the note which he signed.

There is a portion of the answer which tends to show that both Ross and Cooper acted with very little caution in this business. "This defendant, further answering, states that during the same day, or shortly after he had signed the note, he met with Cooper in the streets of Charlotte and asked him if he had signed the note, and Cooper told this defendant that he had, and said Cooper then asked this defendant if he had signed it, and he told Cooper that he had. This defendant then (147) rested contented until a writ was served on him." Now, if there was but one note, either Ross or Cooper must have signed it before the other, and the fact that both were ignorant that the other had signed it ought to have suggested that there was some mistake about it and led to an inquiry which would have disclosed the fact that Moss had procured each to sign a different note so as to show that there were two notes of about the same amount.

In regard to the second note mentioned in the bill, its execution is denied by Ross, and the deposition of Mr. Davis does not establish it. He does not swear to the handwriting of Ross, but thinks there were two notes purporting to have been signed by him as surety of Moss, and says that after the notes were burnt he desired Ross to execute his note in lieu thereof, which Ross declined, saying it was hard to pay security money, and Moss had deceived him by not getting Cooper to sign also, and said nothing about a forgery. If the attention of Ross had been distinctly called to the fact of there being two notes with his name to them, his silence in respect to the fact that he had only signed one note might have led to an inference against him, but such inference would not outweigh his positive denial in the answer, so as in the face of his

oath to establish the allegation of the bill that he had signed two notes. But we think it probable that his attention was not called to it, but, on the contrary, was directed from it by the fact that the writ in the action at law sets out only one debt, $567.87; the two notes being consolidated, and all the circumstances suggest that probably Mr. Davis filled up the writ without noticing the fact that one note was signed by Ross and the other by Cooper, which will explain the matter and prevent any conflict between the answer of Ross and the deposition of Mr. Davis and leave Cooper liable on the other note, unless he is protected by the statute of limitations. However this may be, the plaintiffs have failed to prove that Ross executed more than one note, and must be content to take a decree for the amount of one of the notes and interest.

(148) One of the notes is for $284.07, the other for $283.80, with interest from near the same date, and as the proof does not show which was signed by Ross, the decree will be for the smaller note, the *onus* being on the plaintiff.

PER CURIAM. Decree accordingly.

Cited: Gwyn v. Patterson; 72 N. C., 193.

ADAM BUTNER ET AL. v. H. A. LEMLY.

A partner in a firm for the transaction of business is not entitled to charge for his personal services unless there be a contract entitling him to receive compensation.

CAUSE removed from the Court of Equity of FORSYTH.

Under certain articles in writing entered into between them, the plaintiffs and the defendant purchased of one Shultz two thirds, and from the clerk and master of Forsyth the other third, of a tract of land lying in the county of Obian, Tennessee, for about $3,760, and resold it for a considerable profit. The defendant negotiated the contract for the land with Shultz, and resold it in Tennessee, which occasioned him to make a trip to Nashville, in that State. He gave his bonds with the plaintiffs as surety for the purchase money when they bought, and he took bonds and made a bond for title on the resale in Tennessee. He collected the money in Tennessee (about $10,000) and used it in paying for their purchase, and he has accounted and paid to the plaintiffs all their share of the sums received, except the sum of about $500, which he claims on the ground that he had been at great trouble and pains in managing the business. The plaintiffs objected to the sum demanded, but one of them said to a witness that he was willing to compensate Lemly liberally for the trouble he had had in the business. The prayer

is for an account. The answer admits the facts as stated, but insists that he is fully entitled to the sum claimed for compensation. It is not insisted that there was at any time any agreement to allow (149) the defendant compensation. Cause heard on the bill, answer, and proofs.

Fowle and McLean for plaintiffs.
Morehead for defendant.

BATTLE, J. The only question presented on the record which it is necessary for us to decide is whether the defendant is entitled to compensation for buying and selling the land mentioned in the pleadings and for receiving and paying over the price to the parties entitled thereto. It clearly appears from the pleadings and proofs that there was no agreement between the parties prior to the performance of the services, for which the defendant claims compensation, that he was to receive it. Such being the case, the law is well settled that he is not entitled to it. The parties were partners in the buying and selling of land, and there was no evidence that the plaintiff was appointed a special agent to manage the business, in which capacity only he could have claimed a salary or wages beyond his necessary expenses and disbursements in relation to it. *Buford v. McNeely,* 17 N. C., 486; *Phillips v. Turner,* 22 N. C., 125; *Anderson v. Taylor,* 37 N. C., 420; Collier Part., sec. 183. The case is not varied by what was said by one of the plaintiffs to the witness, Mr. Lash, when the services were about being closed: that he was willing to compensate the defendant liberally. If the expression of such willingness to make compensation can be construed into a promise at all, it was not made to the defendant, it did not purport to be an agreement between all the partners; and if these objections were out of the way, it could, at most, be considered only as a promise on a past consideration, and, therefore, not binding. Steph. N. Pri., 243; Smith Contracts, 56; Law Lib., 117.

The counsel for the defendant, aware of the difficulty of supporting his claim if the parties were to be considered as partners, has attempted to support it on the ground that the defendant was to be regarded as a trustee in the transaction, and, as such, was entitled to a (150) reasonable compensation for his services. We are at a loss to discover how the present defendant can be viewed in the light of a trustee any more than any person who engages with others, either in a speculation or a regular business, can be viewed in that light. It is a mere change of name without any change of character; and a court of equity will not permit one of its best established rules to be thus violated by so simple a stratagem. The agreement of the parties was, in sub-

stance, that they should purchase and sell for their joint benefit a certain tract of land, which made them partners in the transaction, no matter in whose name the purchase was to be made and the details of the business carried on. Such being the case, neither of the parties can charge the others for his services in conducting the business unless there was an agreement for compensation. The defendant is, as we have said before, entitled to have his necessary expenses and disbursements paid by the firm, and for the ascertainment of the amount thereof there must be an account.

PER CURIAM. Decreed accordingly.

E. A. COX AND WIFE; BARBARA, v. ARETUS WILLIAMS ET ALS.

Where a testator gave land and negroes to the separate use of a *feme covert*, his daughter, expressing a want of confidence in her husband and forbidding the trustee from letting him have possession of the slaves, but leaving it discretionary whether he would rent out the land or permit the family to occupy it, it was *Held* that the husband and wife had no equity to compel the trustee to give them possession of the property for a home.

CAUSE removed from the Court of Equity of JONES.

Lewis Williams, by his will, devised and bequeathed, among other things, as follows, viz.: "Having no confidence whatever in E. A.
(151) Cox, the husband of my daughter Barbara, I give and bequeath and devise unto my son, Aretus Williams, his heirs, executors, administrators and assigns, forever, the following property—that is, the tract of land whereon I now reside, subject to the life estate of my wife therein, and a negro woman named Sarah, in special trust and confidence, nevertheless, that he and they will hold the same for the sole and separate use and benefit of my daughter, Barbara Cox, and during her natural life, in such manner that the same shall in no event be subject to the control or liable for the debts or contracts of her husband, E. A. Cox; and I wish Aretus, or his executors, etc., to allow his sister Barbara, either on the said place to live or rent it out," with ulterior limitations of the trust to the children of the said Barbara. In a subsequent clause he gives to his wife a number of slaves for her life, with remainder to Aretus Williams in trust for the sale and separate use of Barbara Cox, as in the preceding clause. Mrs. Irena Williams, by deed properly authenticated, surrendered to Aretus Williams her life estate in the land and slaves given her by the will of her husband, to hold the same as trustee for Mrs. Cox, according to the trusts declared in the foregoing will.

Cox, the husband, and his wife filed this bill against the trustee, setting out that it would greatly promote the comfort of the family of Mrs. Cox and preserve and increase the value of the land and slaves intended for her benefit for her and her husband to have the possession of the property for the purpose of carrying on farming operations, and pray that a decree may pass the court to that effect.

The defendant demurred to the bill generally for the want of equity.

The cause was set down for argument on the demurrer and sent to this Court by consent.

Haughton for plaintiffs.
J. N. Washington for defendants.

PEARSON, C. J. The object of the bill is to have the land and (152) negroes put into the possession of the *feme* plaintiff, so as to let her have the use of the property for the purpose of carrying on a farm without the control and superintendence of the trustee, and the equity is put on the ground that she would thus be furnished with a comfortable home and her support and maintenance be better provided for than by allowing the property to continue under his management. The defendant has filed a demurrer, and in support of it urges that if the property is put into the possession of the *feme* plaintiff, it would, as a matter of course, be subject to the control and management of her husband, the other plaintiff, and thereby defeat the purpose of the trust, and be in direct violation of the expressed directions of the testator.

It is clear, from a perusal of the will, that the testator did not intend that the property, the use of which is given to his daughter, should, in any event, be subject to the control of Cox for this reason: he gives the property to his son, so that it may be under *his* management; and to remove all room for doubt, he sets out in so many words that he does so because "he has no confidence whatever in E. A. Cox, the husband of his daughter."

In respect to the land, he relates, in some degree and gives to his son a discretion "either to let his sister live on the place or rent it out," but this restricted discretion tends to show the more plainly that in regard to the negroes there was to be no discretion, and his son was to keep them under his exclusive management. So it is manifest that the object of the bill is in direct contravention of the trusts declared by the testator. See how it would operate. Suppose, instead of merely permitting his sister to "live on the place," which is within his discretion, the trustee should be required, by a decree of this Court, to let his sister have possession of the plantation and the negroes also; it would then become necessary, in order to carry on the farm, that horses, cattle,

(153) farming utensils, etc., should be provided; and as she is under the control of her husband, it would follow that the entire management and control of the concern would fall into his hands.

A testator has a right to give his property with such restrictions and upon such terms as he sees proper, and the courts are bound to carry his intentions into effect unless there be something in the trusts unlawful and against public policy. So that, so far from showing an equity, the plaintiffs, on their own showing, have none.

We deem it unnecessary to refer to any authority, and put our decision upon the peculiar circumstances growing out of the special provisions of this will.

PER CURIAM. Bill dismissed.

Cited: Braddy v. Dail, 156 N. C., 33.

HENRY CAPPS v. WILLIAM D. HOLT.

1. Receipts for money paid upon a verbal contract, and which are relied on as evidence of the contract, form no exception to the rule that a writing containing a patent ambiguity cannot be helped by a parol evidence.

2. Where the description of the land in a memorandum of contract is vague and indefinite, equity will not decree a specific performance.

3. Where a bill for a specific performance contains a prayer for general relief, and the answer admits the payment of a part of the purchase money, and contains an offer to settle, it was *Held* that the court, although it cannot decree a specific performance for want of a sufficient writing within the statute of frauds will, nevertheless, decree an account and repayment.

CAUSE removed from the Court of Equity of JOHNSTON.

The bill alleges that some time in 1852 the defendant contracted with the plaintiff to convey to him a small tract of land, in the county of Johnston, containing 150 acres, for and in consideration of the sum of $450; that no memorandum of the contract was made at the time; that by the terms of this agreement, the plaintiff was to pay the purchase money in such installments and at such times as should be most convenient; that defendant was to retain the title until all the money
(154) was paid; that in pursuance of this agreement, the plaintiff, on 21 August, 1852, made the first payment and took from the defendant the following receipt:

"Received, this 21 August, 1852, of Henry Capps $100, in part payment of a greater sum due to me on a bargain made by us for a tract of land lying on the north side of the Watery Branch, in the county of

Johnston, and State of North Carolina, containing 150 acres. It is also stipulated between us that so soon as the balance of the money is paid me, I shall then be bound to make him a lawful and just deed for the same. WILLIAM D. HOLT."

The plaintiff relies upon this as being a sufficient memorandum of contract within the statute of frauds.

The bill further alleges that the plaintiff made several other payments at different times, and that he several times applied to the defendant, offering to make the final payment and demanding a conveyance, but the defendant refused to comply with his agreement.

The defendant in his answer admits the payment of a part of the purchase money, but denies the sufficiency of the receipt of 21 August as an evidence of the contract within the requirements of the statute of frauds.

The answer alleges further that by the terms of the verbal contract the purchase money was to be paid within a time certain, and the plaintiff having failed so to pay, defendant several times offered to come to a fair settlement with him by the intervention of any two disinterested persons, with the privilege of calling in an umpire, but plaintiff refused.

R. G. Lewis for plaintiff.
Strong for defendant.

MANLY, J. A specific execution of the alleged contract cannot be decreed. The receipt of 21 August, 1852, is not sufficient as a note or memorandum in writing of the contract to fulfill the requirement of the statute. (Rev. Code, chap. 50, sec. 11.) (155)

The land is described to be "a tract of 150 acres, lying on Watery Branch, in Johnston County."

The position thus given is not definite enough, and no decree for conveyance could be based upon it. From the frame of the receipt, it is not clear that it contains the whole or was *intended* as a memorandum of the contract, and on that account might not meet the demands of the statute. But whether it were so intended or not is immaterial to our present inquiry. The writing, of itself, clearly is too vague and uncertain in the description of the land bargained for to warrant us in declaring where it is, by what termini included, and decreeing a conveyance of it.

It has been settled, specially in reference to contracts of this sort, that they do not form exceptions to the general rule that written contracts cannot be varied, added to, or subtracted from by parol evidence.

The rule is of universal application that apparent ambiguity or uncertainty in contracts cannot be helped by parol; but if the instrument be in itself sufficient, and the ambiguity arise from *proof,* such ambiguity may be explained by proof. This is indeed the discretion between patent and latent ambiguity; the one is apparent upon the reading of the paper, as in our case; the other springs from evidence *dehors;* and parol evidence is inadmissible in the one case and admissible in the other. *Allen v. Chambers,* 39 N. C., 125; *Albea v. Griffin,* 22 N. C., 9; *Murdock v. Anderson,* 57 N. C., 77.

As we are not at liberty to resort to evidence outside of the paper to aid us, and the paper itself is insufficient, it follows the plaintiff cannot have the relief of *specific performance.*

We collect, however, from the answer an offer on the part of defendant to account with plaintiff fairly, and, therefore, having cognizance of the subject-matter of controversy, we take a jurisdiction under the prayer for general relief to adjust the rights of the parties as the defendant offers to do, and it is accordingly referred to the clerk of this Court to state an account between them, charging defendant with (156) all the payments that have been made to him on account of the land and crediting him with a reasonable rent for the same during the time that complainant occupied it, and also for the turpentine boxes.

PER CURIAM. Decree accordingly.

Cited: Dickens v. Barnes, 79 N. C., 492; *Farmer v. Batts,* 83 N. C., 388; *Breaid v. Munger,* 88 N. C., 299; *Wharton v. Eborn, id.,* 346; *McCracken v. McCracken, ib.,* 285; *Wilkie v. Womble,* 90 N. C., 255; *Reed v. Reed,* 93 N. C., 466; *Fortescue v. Crawford,* 105 N. C., 32; *Blow v. Vaughan, id.,* 203; *Cathey v. Lumber Co.,* 151 N. C., 596.

Dist.: Phillips v. Hooker, 62 N. C., 197.

(157)

GEORGE W. LITTLE, EXECUTOR, v. JOHN BENNETT ET ALS.

1. Where a testator gave to his wife, for whom he had a great affection and who had no other provision, all his property *to raise and educate his children, and to dispose of the same among all of them, as their circumstances might seem to require, and to sell any of it for the benefit of her family,* and appointed her sole executrix, it was *Held* that the legal title to the real and personal estate was invested in the wife in trust to manage the property at her discretion for the support of herself and for the raising and education of his children, and that the equitable reversion in the residue, after those purposes should be answered, vested in the children, subject to be divested by the exercise of the power given her to dispose of it among all the children as their circumstances might require.

2. Where a testator gave all his property to his wife to dispose of it among all his children, and she made a will giving *part* of it to grandchildren and other more remote descendants, with contingent remainders, limitations, and cross-remainders to them as purchasers, and part to some of the children for life only, it was *Held* that her will was not a valid exercise of the power, and that the rights of the children were not affected by it.

3. It was *held, further,* that she had a right to contract debts for raising and educating the children and supporting the family on the credit of the estate, and that it was liable for such debts.

4. *Held, further,* that the executor acted properly in keeping up the family establishment until the questions growing out of the will could be settled.

5. *Held, further,* that the interest of the children in the trust was vested, and that one of the daughters having married and died in the lifetime of the mother, her rights vested in her personal representative, who was her husband, but not *jure mariti.*

6. *Held, further,* that after the death of the wife, without exercising the power, the legal title of the real estate vested in the children as heirs at law, and that they thence took the full title to that property, and that the title to debts, and then to the disposition of the husband's will.

CAUSE removed from the Court of Equity of ANSON.

The bill is filed by the plaintiff as the executor of Norfleet D. Boggan and of his wife, Jane G. Boggan, praying directions and indemnity by a decree of this Court in administering the estates of the two testators, the latter of whom was the executor of the former. Mr. Boggan died in 1854, and his will is as follows:

"First. I give and bequeath to my beloved wife, Jane G. Boggan, all my estate, both real and personal, to raise and educate my children, and to dispose of the same among all my children as their circumstances may seem to require. She is hereby fully authorized to dispose of any of my property, either real or personal, by sale, according to her discretion or the necessities of her family may require. I also appoint her my sole executor of this my last will and testament."

After the death of her husband, Mrs. Boggan took possession of the property, consisting of houses and lots in the town of Wadesboro, slaves, bonds, notes, bank stock, and other personal property, and proceeded to manage the same as her own, maintaining and educating the children until her death, which took place in 1857. Her will is, in substance, that both the real and personal property (which she calls her own) shall remain in common until one of her children shall arrive at 21 or marry, then that one equal share shall be allotted to him or her, and so on for each child as he or she might arrive at 21 or marry, such child taking an equal share with the others under age, in the residue. She also provides that the property given to her daughters, of whom there were

three, should be held by her executor in trust for the sole and separate use of such daughters, so as not to be liable for the debts or liabilities of their husbands in case they should marry, and after their deaths to such persons as they might appoint; but should they die intes-
(158) tate, then to their children; and should either of such daughters die intestate and without issue, then to her brothers and sisters surviving her. That if either of the sons should die under 21 without issue, his share should go to his surviving brothers and sisters and the issues of such as might be dead. She also gave her executor power to sell any part of her estate to carry out the provisions of the will, and appointed the defendant, G. W. Little, her executor.

The bill states that after the death of her husband Mrs. Boggan continued to keep up the family establishment, and kept together the family, consisting of six children (all of whom were under age) at their former residence, in the same way her husband had done, until her death; and in doing so had contracted several debts for the use and benefit of the family, which still remain unpaid; that Mrs. Boggan owned no property of any kind except what she acquired under the will of her husband.

Rosa E. Boggan, after the death of her father, intermarried with the defendant John Bennett, and died without issue, in the lifetime of her mother. Mr. Bennett, the husband, administered on his wife's estate, and claims a share of the estate of Mr. Boggan *jure mariti* and as her personal representative.

The executor states in his bill that he has permitted the family to continue to reside at the family mansion, and had kept up the establishment in the same way as it was kept up in the lifetimes of the parents, and that this is still the condition of the family, and that in so doing he has had to incur some expenses, but he says there was no provision in the will of either of the testators to meet such a charge.

The executor prays the court to instruct him as to whether Mrs. Boggan took a full legal and equitable title to the whole of the property of her husband, in the hope and expectation that she would use it for the nurture and education of their children, and in her discretion dispose of it among them without investing them with any right or
(159) claim in law or in equity, as is contended by some of the claimants. Or whether it was the intention of the husband to confer upon his wife a mere legal estate in the property in trust to use it in the nurture and education of the children, and then to divide it among them without giving her any beneficial interest in the property, as is contended by others. Or whether the legal estate was conferred on her in trust to manage the property for her own and their benefit, and then to devolve it on the children, subject to be divested by the exercise of a power to divide it among the children as circumstances might seem to

require, which seemed to the executor to be the proper view of the subject. And if the last construction should be the proper one, whether the disposition made by her will was a fair and proper exercise of the power conferred on Mrs. Boggan by her husband's will.

Again, whether in either view Mrs. Boggan had a right to create debts of the character mentioned, in the exercise of her authority under the will, so as to charge the estate of her husband with the same.

Furthermore, whether the executor could rightfully keep the family together at the family mansion after the death of Mrs. Boggan and make charges against the estate in so doing.

Again, what was the nature of the interest conferred by the will on the children, and whether anything vested in Mrs. Bennett, one of them; and if so, whether such interest vested in her husband as her administrator.

Whether, if the legal estate in the real property was vested in Mrs. Boggan, the same was passed by her will to her executor, or did it descend to her children as her heirs at law?

Lastly. Whether the title to the personal property passed to the executor of Mrs. Boggan by force of the will or wills, or the power conferred on her; and if so, on what terms does he hold it, and to what final disposition is it subject?

All the children and Mr. Bennett, the husband of the deceased daughter, Rosa E., are made parties, and answered, not controverting the facts as herein stated.

The cause was set down for hearing on the bill and answers (160) and sent to this Court.

Ashe and Winston, Sr., for plaintiff.
Blackmer for defendant Bennett.

PEARSON, C. J. Three constructions of the will are suggested:
1. The legal and equitable title of the whole estate, both real and personal, is given to Jane G. Boggan absolutely, with a recommendation—or rather the expression of an expectation—that she will use it so as to raise and educate the children, and dispose of it among them at her discretion, but without conferring on them any rights, either in law or equity. We do not adopt this construction because it is not justified by the language used and it is against the usual course of things for a father to leave his children entirely dependent on their mother.

2. The legal estate is given to her in trust to raise and educate the children, and in trust to hold all of the estate for them, subject to be divested by a power in her to dispose of it among them as circumstances may seem to her to require, without giving her any beneficial interest

whatever. We do not adopt this construction, because it is evident the testator had a great affection for his wife, and we cannot suppose his intention was to leave her unprovided for and entirely dependent upon the children, so as to force her to dissent from the will and claim the provision which is secured to her by law, and thereby defeat the whole plan of his will.

3. The legal title is given to her in trust to manage the estate, at her discretion, for the support of herself and to raise and educate the children, leaving the reversion of the trust estate, after these purposes are answered, to devolve on the children, subject to be divested by the exercise of a power given to her to dispose of it among all the children as their circumstances may seem to require. This, we think, is the proper construction. It is justified by the language used; it satisfies affection which he entertained for his wife and the natural claims of his
(161) children, and it meets the confidence which he seems to have had in the good management and discretion of his wife.

The question then arises, Has the power been exercised so as to divest the estate in the trust which had devolved on the children? The will of Mrs. Boggan does not refer to the power, and no property embraced in it is mentioned specifically, but the whole estate is mentioned and dealt with as if it belonged to her absolutely—which may be accounted for on the supposition that she had adopted the construction of her husband's will which is first suggested above. We are inclined, however, to the opinion that the facts that she owned no property or estate whatever except what she acquired under his will, and that her will purports to dispose of a large estate, indicate with sufficient distinctness an intention to make a disposition of the property embraced by the power, so that her will would be a valid exercise of it except for another objection—which is fatal and renders all of the appointments inoperative and void. The power confided to her was to dispose of the property among all of the testator's *children* as their circumstances may seem to require. Her will does not give the property to the testator's children, but gives it to his *grandchildren* or other more remote descendants. The sons are not to have anything unless they arrive at the age of 21 years or leave issue, and the daughters are only to have the use of it for a limited time, to wit, during their lives, and the ownership or absolute property is given to *their children, taking as purchasers,* with cross-limitations in the event of death without issue. This is not a due exercise of the power. In one point of view it does not go far enough, because only limited and restricted estates are given to the objects of the donor's bounty or the persons embraced in the power. In another point of view it goes too far, because it extends to persons who are not embraced by the power, and consequently fails in both respects to carry

into effect the gift which the testator intended, through her instrumentality, to make to his children. It follows that the appointment must be treated as inoperative, as the scope and extent of the (162) power was clearly mistaken by her; so that the estate in the trust which vested in the children, subject to be divested by the exercise of the power, is not affected by it.

The solution of the many difficulties suggested by the bill is now comparatively easy, and has been, in a great degree, accomplished:

1. Mrs. Boggan being authorized, in her management of the estate, to dispose of any of the property to meet the necessities of the family, or at her discretion, she, of course, had a right to incur debts upon the credit of the estate while it was under her management, and the property is liable for such debts in the hands of her executor.

2. We think her executor was at liberty to allow the family to have the use of the property so as to keep up the establishment, as was done in her lifetime, until the many questions which embarrassed his administration could be settled by a definite construction of the two wills under which he was acting. In taking the account, all proper allowances will be made to him for charges in this behalf.

3. The estate of the children in the trust was vested, consequently Mrs. Bennett had such an equitable interest in the personal estate as would, at her death, devolve on her personal representative, and Mr. Bennett is entitled to it as her administrator. He did not acquire it *jure mariti,* because it was an *equitable* estate and was not reduced into possession during coverture.

4. The legal title of the real estate, which was in Mrs. Boggan, did not pass to her executor, and it is not devised to him, consequently it passed to the children as her heirs at law, and the trust estate which they held then merged in it, so they have a perfect title as tenants in common.

5. The legal title of the personal estate passed to her executor by force of the will. He holds it subject to the payment of the debts incurred by her and to an account, which must be taken of his administration, and will then deliver it to the children and those (163) who represent them for the purpose of partition.

PER CURIAM. Decree accordingly.

Cited: Stroud v. Morrow, 52 N. C., 465; *Alston v. Lea,* 59 N. C., 32; *Mason v. Sadler, id.,* 152; *Young v. Young,* 68 N. C., 315; *Edwards v. Lane,* 94 N. C., 370; *Mabry v. Brown,* 162 N. C., 221; *Jarrell v. Dyer,* 170 N. C., 178.

SAMUEL S. HARRISON ET ALS., EXECUTORS, v. NANCY EVERETT ET ALS.

A provision in a will allowing a slave the privilege of choosing his own master is not against the policy of the law.

Cause removed from the Court of Equity for CASWELL.

John Everett died in the county of Caswell, in June, 1858, and left a last will and testament, one clause of which is in the following words: "I desire that my negroes shall have the privilege of selecting their masters, their value to be ascertained by two disinterested men—one selected by the master they may choose and one by my executors."

The bill is filed by the executors for the direction of the court as to their duty arising under this clause of the will.

Fowle for plaintiff.
Hill and J. W. Graves for defendant.

BATTLE, J. The only question upon which a declaration of our opinion is asked at present is whether that provision of the testator's will in which he expresses his desire that his slaves, whom he directs to be sold, shall have the privilege of choosing their own masters, the price to be ascertained by two persons to be chosen by the masters and the executors, respectively, is consonant with law and proper to be carried out by the executors. It is settled in this State that such a humane provision by a testator is not against the policy of our law, and ought to be observed. *Washington v. Blount,* 43 N. C., 253; *Delap v. Delap,* 55 N. C.,
(164) 290. The only argument against it is that the slave is incapacitated by his condition from making a choice of a master, or doing any other act which requires judgment and will, and that it has been so held in a sister State. We have understood that it has been decided by the Court of Appeals in Virginia that a slave cannot elect to be free under a will authorizing such a choice. We have very recently held directly to the contrary (*Redding v. Findley,* 57 N. C., 216), and are unable now to perceive any reason for changing that opinion.

PER CURIAM. Decree accordingly.

Cited: Reeves v. Long, post, 357.

DIBBLE & BROS. v. SCOTT & BRO. AND WIELL & ANATHAN.

Where a party bought an inland bill of exchange *bona fide* and in the regular course of business, but without endorsement from the payee, and brought a suit at law in the name of the payee, to his use, against the drawer, it was *Held* that although the drawer and payee both alleged the instrument was forged, on such payee's receiving from the beneficial claimant a bond to indemnify him, he would be restrained from dismissing the suit at law, and that the defendant would be restrained from using a release in that court until the question as to genuineness of the paper might be tried.

CAUSE removed from the Court of Equity of LENOIR.

The bill alleges that in the regular course of business and *bona fide,* the plaintiffs obtained from one Charles Eaton an inland bill of exchange, drawn by the defendants Scott & Bro. for $259, on Lamont & Monk, of Wilmington, drawn in favor of Weill & Anathan, payable sixty days after date, and dated at Wilmington, 20 April, 1857, which said bill is endorsed by Daniel Perry, F. B. Harrison, and Bryan Quinn. That at the maturity of the said bill they presented it to Lamont & Monk, who refused to pay it, because, as they said, they were so instructed by the defendants Scott & Bro. The plaintiffs having made demand of Scott & Bro. and given notice to the endorsers, (165) brought suit at law in the name of Weill & Anathan, to their use, against the defendants Scott & Bro. and the endorser Quinn, and that the same is still pending in the county of Lenoir. That the defendants Scott & Bro. have procured from Weill & Anathan a release of the said cause of action and an authority to have said suit at law dismissed. That they have pleaded the release aforesaid to their cause of action and threatened to have the same dismissed by virtue of the said written authority obtained from the defendants Weill & Anathan. The prayer is for an injunction to restrain the defendants Scott & Bro. from setting up the said release in the court of law and to forbid the said Weill & Anathan from dismissing the said suit at law. The injunction issued in vacation.

The defendants Scott & Bro. answered that they did not make any such bill of exchange to Weill & Anathan, and the latter answer that they never had such a bill, and they both say the one in question is a forgery, and, as they believe, perpetrated by Charles Eaton, from whom plaintiffs got it. The account which they give of the transaction is that Scott & Bro. made a bill of goods with Weill & Anathan and took a note of hand for the amount ($259), and it was agreed that if this note was not paid at maturity, in cash, it was to be met by a bill of exchange on Lamont & Monk at sixty days; that the blank form of such a bill was prepared at Wilmington, where Weill & Anathan resided, and taken home by the defendant J. F. Scott to be used as above stated in case it

became necessary, but that they paid off the note at maturity, and having no occasion to use the bill of exchange had not signed the same; that they (Scott & Bro.) had loaned the blank form thus prepared to a neighbor by the name of Williams, as a guide to him in a matter of business, and that Eaton, who was his clerk, stole the same, forged the names of Scott & Bro. to it, and put the same in circulation, and has since fled the country for that and similar crimes. They both answer that the release was given because there was no debt due from
(166) Scott & Bro. to Weill & Anathan, and that it was no more than equity and justice that the same should be used to defeat the said action. Weill & Anathan admit that they have given a written authority to the clerk to dismiss the suit, and that this was done for the reasons above stated. Replication to the answer.

On coming in of the answers, the defendants moved to dismiss the bill for the want of equity and to dissolve the injunction, and the cause being set down for hearing on the bill, answer, and on the motion to dissolve, was sent to this Court.

No counsel for plaintiffs.
McRae for defendants.

BATTLE, J. It is a well-settled rule of the court of equity that it will restrain by injunction the assignor of an equitable claim from dismissing a suit at law brought by the assignee in his name. *Deaver v. Eller,* 42 N. C., 24; 2 Story Eq. Jur., secs. 1040, 1050. The present is not a case of such assignment, but it is one in which the plaintiffs allege that they purchased *bona fide,* in the regular course of their business, an inland bill of exchange purporting to have been drawn by the defendants Scott & Bro. on Lamont & Monk of Wilmington, and payable to the defendants Weill & Anathan, which was not endorsed by the said payees, but was endorsed by other persons to the plaintiffs for value paid by them. The defendants Scott & Bro. allege that the bill of exchange is a forgery, and the other defendants Weill & Anathan deny that they ever held such a bill of exchange as payees, and, of course, could never have put it in circulation, and they executed to Scott & Bro. a release of all their interest in it. But notwithstanding these answers, we think that the plaintiffs have a right, upon executing to the defendants Weill & Anathan a suitable and sufficient bond of indemnity, to institute and carry on a suit at law in their names against Scott & Bro. to try the question whether the instrument in controversy is a
(167) forgery or not. Weill & Anathan, upon having such an indemnity provided for them, cannot have any direct interest in the event of the suit, and the other defendants ought not to be allowed to

use the release to avoid their responsibility upon the bill of exchange if it were not in fact a forgery, and if they be liable to the plaintiffs upon it according to the law merchant. As between the plaintiffs and these defendants, so far as the pleadings show, the question is purely a legal one, and the latter ought to be restrained from insisting on the release for the purpose of preventing a trial at law.

A decree may be drawn upon the principles herein declared.

PER CURIAM. Decree accordingly.

MARY E. JOHNSON, EXECUTRIX OF HEZEKIAH JOHNSON, v. JAMES F. JOHNSON ET ALS.

Partial payments of a legacy made by the executor should be applied to extinguish the interest due at the date of the payments, in the first place, and the residue, if any, to be applied to the extinguishment of so much of the principal.

CAUSE removed from the Court of Equity of YADKIN.

The suit was against an executor for the payment of a legacy. There was a decree for an account to ascertain how much was due to the plaintiff as executrix of Hezekiah Johnson, the legatee. Partial payments had been made by the defendant, and, in stating the account, the commissioner had charged the defendant with the amount of the legacy and interest thereon and credited him with the sums paid and interest thereon from the times when they were paid.

The plaintiff excepted to the report because interest was charged against the plaintiff on the money paid to her testator in part payment of her legacy.

The cause was heard on the exceptions.

Winston, Sr., for plaintiff. (168)
Mitchell for defendant.

PEARSON, C. J. The exceptions filed by the plaintiff raise a question as to the mode of applying credits and calculating interest. We think the principle insisted on by the plaintiff is the true one. The exceptions are, therefore, allowed and the account must be reformed accordingly. The principle is settled that a payment should be applied to extinguish the interest on the amount of the sum due at the *date of the payment,* and the residue, if any, be applied in extinguishment of principle.

The report will be reformed according to the opinion by a reference to the clerk.

PER CURIAM. Order to refer the report for correction.

BENJAMIN BARNAWELL AND WIFE v. GEORGE A. SMITH, ADMINISTRATOR OF P. B. THREADGILL.

1. Where a declaration was made that an executor had fraudulently combined with others to run off and waste the assets in his hands, so as to defeat the collection of a judgment at law (the administrator of such executor being a party to the suit at the time of such declaration), it was *Held* not to be good ground of exception to the report of a commissioner directed to take an account of the assets of such executor in the hands of his administrator that no formal decree had been made against him, as administrator, at the time of the declaration.

2. Where a bill was filed against the representative of a fraudulent executor to subject his estate to the payment of a judgment at law, it was *Held* that such representative had no right, after the bill was filed, to pay other debts due by such executor of no higher dignity than that sought to be satisfied in this Court.

3. An administrator who pays a debt presumed, from lapse of time to have been paid, is bound, in a settlement of the estate, to show that such presumption is not true, but that the debt is in fact still unpaid.

(169) THE cause out of which this matter emanates (*Barnawell v. Threadgill*, 56 N. C., 50) was heard at December Term, 1856, of this Court.

The bill was filed originally against Patrick B. Threadgill, as executor of Col. Thomas Threadgill, to procure satisfaction of a judgment at law rendered in favor of plaintiffs against the said executor. The bill alleged that the said P. B. Threadgill had combined with other defendants, who were legatees and next of kin of his testator, fraudulently to deliver to them the assets of the estate (chiefly slaves), so that the same might be wasted and put out of the way in order that the collection of plaintiffs' judgment might be defeated, and that these assets were more than sufficient to pay this and all other debts of the estate. At the said term (December, 1856) a declaration was made that these allegations were true in fact, and a decree was made, following portions of the assets in the hands of certain of the defendants. The said P. B. Threadgill having died, his administrator, the defendant G. A. Smith, was made a party at the term at which the said decree and declaration were made; and satisfaction not having been made out of the assets in the hands of the other defendants, an order was made at June Term, 1858, of this Court directing W. E. Troy, Esq., to state an account of the assets of the estate of P. B. Threadgill in the hands of the administrator. The said commissioner made his report to this term, and exceptions, as stated in the opinion of the Court, were filed on both sides. The cause was heard on these exceptions.

J. H. Bryan for plaintiffs.

Winston, Sr., Ashe, Blackmer, and B. F. Moore for defendants.

BATTLE, J. This case comes before us for further directions upon certain exceptions heretofore filed by each party to the report of Mr. Commissioner Troy, in relation to the administration by the defendant Smith of the estate of his intestate, Patrick B. Threadgill, who was the executor of Thomas Threadgill. The counsel for the defendant Smith now insists that there is no decree against his client, and (170) urges that as an exception to the whole report. We think the exception cannot now be entertained by us. The liability of Patrick B. Threadgill to the plaintiffs, on account of a *devisavit* of the assets of the testator, has been adjudicated in this Court, and upon that the liability of the other defendants was predicated, as will be seen in the opinion heretofore given in the cause (56 N. C., 50). The administrator of the said P. B. Threadgill was, after his death, made a party to the suit and submitted to the reference to the commissioner, and upon the coming in of his report at the last term of this Court filed exceptions thereto, at which time the counsel for the plaintiffs also filed exceptions. The only questions, then, which are now before us arise upon the report and the exceptions thereto. If the defendant Smith wish now to object to the whole report upon the ground stated by his counsel, he should bring it forward by a petition to rehear the order for the reference, and that would probably be met by a motion to enter, *nunc pro tunc,* a decree, to which the plaintiffs were and are still clearly entitled.

We will proceed, then, to consider the exceptions to the report of the commissioner, and will take up first that filed by the defendant, which is, "because he has rejected the vouchers mentioned in his report, they being proper debts, charges, and expenditures of the estate of his intestate and not of inferior dignity to the claim of the plaintiff against the estate of Thomas Threadgill." This exception seems to be based upon the ground that the plaintiffs are now proceeding against the estate of Thomas Threadgill, the testator of the defendant Smith's intestate, Patrick B. Threadgill. This is a mistake. P. B. Threadgill, by his *devastavit,* rendered himself personally liable for the plaintiff's debt, and after their bill was filed for the purpose of enforcing that liability, as well as for purpose of following some of the wasted assets in the hands of the other defendants, the defendant Smith had no right to make a voluntary payment to other creditors of his intestate, whose debts were not of higher dignity. This is common learn- (171) ing, and does not require the citation of any authority in its support.

The exceptions of the plaintiffs are three in number, and we will consider them in the order in which they are stated.

The first is, that the commissioner has credited the administrator with the receipt of the widow of the intestate for $75, the amount of her

"year's allowance as laid off by the commissioners appointed by the court." This receipt appears to have been given on 14 October, 1856, which was before any decree was obtained in the cause against the administrator for the *devastavit* of his intestate. The claim of the plaintiffs was, therefore, at most, but a debt against the intestate, over which the Revised Code, chap. 118, sec. 20, gave the widow's year's allowance a preference. The exception must, therefore, be overruled.

The second exception is, that the administrator is credited with sundry payments which appear to have been made in 1857 on judgments rendered against the intestate more than ten years before, to wit, in 1842 and 1843. The counsel for the plaintiffs contend that these judgments were, in law, presumed to have been paid, and, therefore, the administrator paid again in his own wrong, and that the plaintiffs ought not to be prejudiced by it. On the other hand, the counsel for the administrator insists that he was not bound to plead or rely upon the statute of presumptions, and that if he believed the debt to be an honest one he had not only a right to pay it, but it was his duty to do so. We do not doubt that an executor or administrator has a discretion whether he will plead the ordinary statute of limitations to a claim against the estate of his testator or intestate, and that if he is satisfied that the claim is just he is not bound to plead the statute in a suit against him at law. But we think the case is different where the alleged claim or debt is so old and stale that the common or statute law raises a presumption of its having been paid from the lapse of time. In such a case the administrator, before he pays such a claim, ought to show that the pre-
(172) sumption was untrue, and that it had not in fact been paid or satisfied. See *Williams v. Maitland,* 36 N. C., 100; *McCulloch v. Daws,* 22 E. C. L., 386; *Shaven v. Vanderhorst,* 4 Eng. Con. Ch. Rep., 458. Especially ought such proofs to be required where a creditor of an intestate has a suit pending against the administrator upon which he afterwards obtains a decree. This exception is, therefore, sustained.

The third exception is, that the administrator is credited with sundry payments made in 1857 on judgments obtained against the administrator in suits on bonds given by the intestate more than ten years before. In these suits the administrator set up no defense and permitted the judgments to be given against him by default. For the reasons assigned in sustaining the second exception, we think the present must also be held valid.

The result is that the report must be recommitted to Mr. Commissioner Troy, with instructions to disallow the vouchers mentioned in the second and third exceptions of the plaintiffs unless the defendant Smith can show that the claims for which those vouchers were taken, and which, by presumption of law, were paid were never in fact paid. The

commissioner must report the evidence, if any be offered, to rebut the presumption of payment which the statute raises from the lapse of time.

PER CURIAM. Rereferred to commissioner.

Cited: Halliburton v. Carson, 100 N. C., 106; *Pate v. Oliver,* 104 N. C., 466.

(173)

TYRE GLEN, ADMINISTRATOR *de bonis non* OF PHILIP HOWARD, *v.* JOHN KIMBROUGH AND NICHOLAS L. WILLIAMS, EXECUTORS OF GEORGE KIMBROUGH, SR., AND GEORGE KIMBROUGH, JR.

Where an administrator of an estate died without having rendered an account or made a settlement, and administration *de bonis non* was not taken on the estate of the intestate until after the lapse of thirty-four years, it was *Held,* in a suit begun immediately after the grant of such administration, that no presumption of settlement, satisfaction, or abandonment arose from the lapse of this time, but that such administrator *de bonis non* was entitled to an account against the representative of the deceased administrator.

CAUSE removed from the Court of Equity of YADKIN.

The facts of the case are fully stated in the opinion of the Court.

Fowle for plaintiffs.

Boyden for defendants.

MANLY, J. George Kimbrough, Sr., the testator of the defendants, was the executor of George Kimbrough, Jr., and therefore the defendants, upon a well-known principle, became the executor of the first testator. It appears, furthermore, that George Kimbrough, Jr., was the administrator of Philip Howard; that he took administration in 1818, and died in 1823, without settling the estate of his intestate, and thereupon such property as was left unadministered passed into the hands of the testator of the defendants. There was no representative of the estate of Philip Howard from 1823 until 1857, when complainant took out letters of administration *de bonis non* and soon after brought this bill for an account of his intestate's estate.

We think, upon this state of facts, the administrator *de bonis non* is entitled to an account from the defendants, who, as we have said, are the executors of the first administrator. A long time has elapsed, but any presumption which might arise from a mere efflux of time is perfectly rebutted by the fact that there was no one, from the death of George Kimbrough, Jr., to the grant in 1857 of administration *de bonis non* who was legally authorized to make a settlement. (174)

There is no statute bar in a case of this sort but from long lapse of time a presumption at common law will arise that there has been either a settlement or an abandonment.

It does not appear how the estate of Howard was administered. It seems that two slaves were divided as late as 1837, at the instance of George Kimbrough, Sr., among the next of kin, and it is averred generally by his executors that the estate was exhausted in the payment of debts, and proved insolvent, but no account was audited by commissioners and none at any time rendered or filed. There was no settlement or attempt at settlement with those entitled, and the estate thus unadministered passed, after the death of the administrator, into the hands of his executor, George Kimbrough, Sr.

The most favorable view which can be taken of the possession, or tenure, by which the testator of the defendants held, is upon an implied trust. With respect to such a trust, after the lapse of twenty years and the absence of all proof as to the truth of the matter, a presumption of payment or satisfaction or abandonment will arise; but this presumption is one of fact and is rebuttable, and where it appears it has not been settled, or where it appears there was no one with the legal power to make a settlement, the presumption is rebutted.

State demands are unwillingly countenanced in courts. Interference in behalf of those who sleep on their rights or who procrastinate them until evidence has passed away is reluctantly awarded, even where there is no statute bar; but where the delay is explained and the common-law presumption repelled, we feel constrained to subject the matter to investigation by decreeing an account.

The conclusion is warranted by the cases of *Falls v. Torrence,* 11 N. C., 412; *Bird v. Graham,* 36 N. C., 196.

Per CURIAM. Decree accordingly.

Cited: Long v. Clegg, 94 N. C., 767; *Burgwyn v. Daniel,* 115 N. C., 119.

(175)

DRAPER, KNOX & CO. v. WILLIAM B. JORDAN AND WIFE.

The separate estate of a married woman is not liable to her personal engagements generally, but only where the debt is charged specifically upon her separate estate, with the concurrence of the trustee, if there be one.

CAUSE removed from the Court of Equity of MONTGOMERY.

The facts disclosed in the pleadings are these: The plaintiffs are merchants in the city of New York and trading under the name of Draper, Knox & Co. In 1853, the defendant William B. Jordan purchased goods of them to a large amount, and being called upon by them

for payment tendered his wife, Martha Jordan, as his surety, who was accepted, and they thereupon executed their joint and several promissory note for the sum of $635.85, bearing date 22 September, 1853. The following is a copy of the note:

"NEW YORK, 22 September, 1853.

"Six months after date, I promise to pay to the order of Draper, Knox & Co. $635.85, at their office, value received.

"WILLIAM B. JORDAN.
"MARY J. JORDAN."

It appeared, also, that at the time of the execution of this note defendant Mary J. Jordan was possessed of a considerable estate, which was bequeathed to her by her father to her separate use and benefit, but there was no trustee appointed. There was no averment of a specific charge of this debt by the wife on her separate estate, and in her answer she distinctly avers that such was not her intention, but that she signed the note at the request of her husband, and was at the time assured by him that it did not bind her separate property. The defendant William B. Jordan has since become insolvent, and the bill is filed to subject the wife's separate estate to the satisfaction of the note.

Ashe for plaintiff.
Kelly for defendant.

MANLY, J. The case brings up again the inquiry, How far and (176) under what circumstances the separate estate of a married woman is liable for her engagements?

This subject has undergone much discussion and has been variously settled elsewhere, but in North Carolina it is still considered an unsettled question in many respects.

No case has yet gone to the extent of sanctioning the doctrine, that as to the separate property the married woman is regarded as a *feme sole* in all respects. This seems to be the English doctrine followed in this country by New York, but not by any other State that we are aware of, while Pennsylvania, Virginia, South Carolina, Tennessee, and Mississippi adopt a different rule. In *Frazier v. Brownlow,* 38 N. C., 237, it has been decided by this Court that a married woman may, in an obligation which she contracts, specifically charge the same on her separate property where it is done with the concurrence of the trustee. And in *Harris v. Harris,* 42 N. C., 111, it is decided, where slaves are bequeathed to the sole and separate use of a married woman during her life (no trustee being named), and then for the use of two daughters, and then over to their children, that a sale by the woman, in which her

husband, the daughters and their husbands joined, was good. It was not necessary to this latter decision that a different principle should be resorted to than that on which *Frazier v. Brownlow* rests. The sale by the parties might have been upheld for the life of the wife as a charge upon the profits only, and in that way the two would have been consistent and stood upon ground which we think more compatible with the objects of such settlements and the rules of the common law. The principle of the case of *Frazier v. Brownlow* we adopt, because we are unwilling to take a step backward and to unsettle a matter which has been considered as settled so long and which has, we doubt not, been frequently followed. But we are at the same time unwilling to depart further from the principles of the common law in relation to the disabilities of married women and run into the labrinth of difficulties which allows the doctrine whereby they are treated as *femes soles*. We prefer
(177) adhering as closely as may be, consistently with decided cases, to the rule that a separate estate for the support of a married woman does not confer any faculties upon her except those which are found in the deed of settlement, and that in all other respects she is a *feme covert* and subject to the usual disabilities.

As we have said, however, we recognize as settled law the principle upon which *Frazier v. Brownlow* stands, viz., that a wife may, when not restricted by the deed of settlement, with the concurrence of the trustee, specifically charge her separate estate with her contracts and engagements. She may encumber expressly, but not by implication.

At common law, the legal existence of the wife was for most purposes merged in that of the husband; she could not, except in special cases, contract nor sue or be sued, nor make any contract in respect to her separate estate that would in law bind her. But courts of equity, as a consequence of the principle established by them—that a married woman may take and enjoy property to her separate use—enable her to deal with it in certain respects as a *feme sole*. She may alien or encumber it in execution of powers conferred on her by the terms of the trust, and if not restricted by the terms may, under the authority of *Frazier v. Brownlow*, charge the income or profits with the payment of debts or appropriate them to any selected object, provided such charge or appropriation be specific and unequivocal and concurred in as before stated.

She is not liable by reason of her separate property to her general personal engagements by holding such engagements a charge by implication or by any similar rule of construction.

We are not sure this restricted view of the powers and liabilities of married women will adequately protect them from the peculiar influences which act upon them, but we are quite sure the other, of regard-

ing them as *femes sole* in respect to their separate estate, would render such settlements in very many cases futile and vain.

It will be seen from what has been said, that the creditor's bill cannot be sustained. This equity rests upon the ground that the separate estate of the wife is responsible for her personal engage- (178) ments generally, although not charged with them specifically. This the Court does not hold.

PER CURIAM. Bill dismissed.

Cited: Felton v. Reid, 52 N. C., 271; *Johnson v. Malcolm,* 59 N. C., 123; *Rogers v. Hinton,* 62 N. C., 106; *Withers v. Sparrow,* 66 N. C., 138; *Harris v. Jenkins,* 72 N. C., 185; *Pippin v. Wesson,* 74 N. C. 442; *Cooper v. Landis,* 75 N. C., 533; *Hardy v. Holly,* 84 N. C., 667; *Kemp v. Kemp,* 85 N. C., 497; *Flaum v. Wallace,* 103 N. C., 306; *Monroe v. Trenholm,* 112 N. C., 640; *Kirby v. Boyette,* 118 N. C., 255, 260; *Sanderlin v. Sanderlin,* 122 N. C., 3; *Vann v. Edwards,* 135 N. C., 673; *Cameron v. Hicks,* 141 N. C., 24.

CULLEN CAPEHART v. JAMES G. MHOON ET ALS.

1. Where the aid of a court of equity is invoked to set aside a note and refund money on account of a mutual mistake of fact, and it appears that the party complaining had the means of correct information within his power, but negligently omitted to avail himself of them, it was *Held* that he was not entitled to the relief sought.

2. Where one, believing that he was a surety on an administration bond, settled with the next of kin, who were under the like impression, the administrator becoming insolvent, it was *Held*, that on its appearing that he was not surety, he had an equity to be subrogated to the rights of the next of kin against the real sureties on the bond.

CAUSE removed from the Court of Equity of BERTIE.

In April, 1830, Kenneth West died intestate, seized and possessed of a large real and personal estate, leaving a widow and three children. The defendant Rhodes became his administrator and the defendants Mhoon and one Webb became his sureties on his administration bond. In 1832, Rhodes left the State, and in 1834 failed in business, and has ever since been insolvent. Rhodes and the plaintiff married sisters, and there was great intimacy and friendship between them. The plaintiff had been much in the habit of endorsing for him, and when he left the State the plaintiff and his son, George W. Capehart, acted as his agent in the settlement of some of his other business.

In 1842 the plaintiff and James Allen came to a settlement of Rhodes' liability to the widow and the next of kin of Kenneth West, he (Allen)

(179) having married one of the daughters, and the plaintiff admitted a liability to the amount of $4,000, part of which he paid, and for the residue gave his note to Mrs. West, as guardian of her children. This liability was assumed by the plaintiff on the supposition and belief that he was one of the sureties of Rhodes on his administration bond. It appears, indeed, that Mr. Allen said this to the plaintiff, honestly believing it to be so. The plaintiff states in his bill that he believed this to be the case from the fact of his intimacy with Rhodes and his habit of becoming surety for him whenever called on to do so, and excuses himself for his remisses in not fully informing himself as to the fact from bodily infirmities. The bill prays for an injunction against the note thus given and for reimbursement of the sums thus paid under a mistake. The administrator Rhodes and the real sureties, Mhoon and Webb, are made parties, and the plaintiff prays, in case the primary equity asked for against Mrs. West and her children shall be refused, that he may be subrogated to the rights of the next of kin of Kenneth West on the administration bond against the real sureties thereto.

An injunction issued, which, on the coming in of the answer of Mrs. West, was dissolved (44 N. C., 30) and the bill continued as an original. Proofs were taken, and, being set for hearing, the cause was sent to this Court.

Badger, B. F. Moore, and Winston, Jr., for plaintiff.
Barnes and Hardy for defendants.

BATTLE, J. This cause was before the Court at December Term, 1852, upon an appeal from an interlocutory order made in the court below, on the motion of Mrs. West, one of the defendants, to dissolve an injunction which the plaintiff had obtained against a judgment in her favor at law and in which her children, who are some of the defendants, were interested. Her answer being considered full, fair, and sufficiently responsive to all the material allegations of the bill, and having denied all the facts upon which the plaintiff's claim to equitable relief was founded, the order dissolving the injunction was directed to (180) be affirmed. See 45 N. C., 30. The bill was therefore held over as an original, and after many proofs were taken on both sides, the cause was set for hearing and transmitted to this Court, where it now comes on to be heard.

The ground upon which both the primary and secondary relief is sought is based upon the allegation that all the payments made to Mrs. West and the note given to her as mentioned in the bill were made upon a mutual mistake of fact existing between the plaintiff and her attorney

and agent. That such a mistake is a good ground of equitable jurisdiction, has been long and well established, but it is equally well established that no person can claim the aid of a court of equity who does not exercise a reasonable diligence to ascertain the truth. Fonb. Eq., book 1, chap. 2, sec. 7, note v; 1 Stor. Eq., sec. 149 *et seq.* It is to the vigilant, and not the supine, that the Court gives its aid. This principle is clearly set forth and strongly illustrated in a case decided in this Court (see *Crowder v. Langdon,* 38 N. C., 476), in which the material facts were that the plaintiff, defendant, and one Whitaker were partners in the mercantile business, of which the defendant first and Whitaker afterwards were the active partners. The plaintiff being ignorant of such matters became dissatisfied and proposed a dissolution of the firm, to which the defendant objected, but proposed to sell to the plaintiff his interest in it at a certain price upon the basis of a statement made by the defendant from the books and information received from Whitaker, and which the defendant assured the plaintiff was correct. The amount of the debts due from the firm were stated from the recollection of the defendant and Whitaker as no account of them was found in the books. The sources from, and the manner in which the statement was made out, were known to the plaintiff. It was afterwards ascertained that the statement was erroneous, particularly in the amount of the debts which the firm owed, and the plaintiff filed his bill for relief upon the grounds both of fraud and mistake. The Court declared that the proofs failed to establish the charge of fraud, and decided against the plaintiff upon the ground of mistake, because he had not used reasonable (181) diligence in endeavoring to ascertain the true condition of the partnership affairs before he made his purchase from the defendant. In relation to this subject, it was said by the Court that "the general rule unquestionably is that an act done or a contract made under a mistake or ignorance of a material fact is relievable in equity. But where the means of information are alike open to both parties, and when each is presumed to exercise his own judgment in respect to extrinsic matters, equity will not relieve. The policy of the law is to administer relief to the vigilant and to put all parties to the exercise of a proper diligence. In like manner, where the fact is equally unknown to both parties where each has equal and adequate means of information, or where the fact is doubtful in its own nature, in any such case, if the party has acted in entire good faith, a court of equity will not interpose. Where each party is equally correct, and there is no concealment of facts, mistake or ignorance is no foundation for equitable interference." For these positions, the Court refer to the works which we have already cited, and also to 1 Maddock's Ch. Pr., 62, and 1 Pow. on Con., 200.

These principles, applied to the case before us, show clearly that the plaintiff is not entitled to the primary relief which he asks against Mrs. West and her children, the widow, and next of kin of Kenneth West. The mistake under which he acted in making the settlement with Mr. Allen was one into which he would not have fallen had he used ordinary prudence and diligence to prevent it. The administration bond to which he supposed he was one of the sureties he well knew was in the office of the clerk of the county court, and he might at any time, either in person or by an agent, have inspected it. His bodily infirmity and his other excuse for not having done so amount to nothing, because he does not even pretend that he ever made an attempt in any manner or at any time, before the settlement, to see the bond or to have it examined. But he says that his mistake was caused by the positive assertion of
(182) Mr. Allen that he was one of the sureties. He exculpates Mr. Allen from the charge of having made a willful misrepresentation by asserting that he was laboring under a mistake. Supposing that to be so, how did it happen that *he* fell into the error? We think it highly probable that he did so for the causes assigned by the plaintiff to explain the reason why he so readily acquiesced in the truth of Mr. Allen's assertion. He states that he was the brother-in-law and intimate friend of Mr. Rhodes, the administrator, and was in the constant habit, both before and after the administration bond in question was given, of signing instruments for him as his surety. When Mr. Rhodes left the State, before he had made a final settlement of the estate of Kenneth West, upon which he had taken out letters of administration, the plaintiff and his son, George W. Capehart, had, or appear to have, in some way the management of it. The plaintiff was undoubtedly to a considerable extent connected with the unsettled affairs of his friend and brother-in-law. Under these circumstances, it was not at all unlikely that Mr. Allen should suppose that the plaintiff was one of the sureties to the administration bond given by Rhodes, and should so say, but we cannot see how that can relieve the plaintiff from the imputation of negligence in not going or sending to the clerk's office to ascertain from an inspection of the bond itself the truth of the matter. The court of equity ought not to encourage such negligence by giving relief to one guilty of it. Especially ought the Court to withhold its aid since a court of law will not redress the alleged injury of a person who complains of a fraud if by the exercise of even ordinary prudence he could have prevented it. "It is a very reasonable principle," said Taylor, C. J., in *Fagan v. Newsom,* 12 N. C., 21, "that the purchaser should not be entitled to an action of deceit if he may readily inform himself as to the truth of the facts which are misrepresented." The same principle was applied in the subsequent cases of *Saunders v. Hatterman,* 24 N. C., 32; *Lytle v. Bird,*

48 N. C., 222, and *Fields v. Rouse, ibid.,* 72. In the latter case (183) the alleged deceit consisted in the misrepresentation of the true amount of a bond taken by the clerk and master of the court of equity for the county of Wayne and then in his office in the town of Goldsboro. The transaction in which the fraudulent misrepresentation was charged to have been made occurred in that town, and the court said, among other things, that "by going a few steps, it was in the power of the plaintiff to have ascertained the true amount of the bond in principal and interest; in not doing so, he took upon himself the responsibility of the correctness of the defendant's representation; the means of ascertaining the fact were open to him equally with the defendant."

Our conclusion, then, is that the plaintiff is not entitled to the primary relief he prays against the widow and children of Kenneth West to recover back the money which he paid upon the mistaken supposition that he was one of the sureties to the bond given by the administrator of the estate of the said West.

With regard to the secondary equity sought by the plaintiff, which is that he may be subrogated to the rights of the widow and children of Kenneth West against the administrator and his sureties, or at least that he may be permitted to prosecute the claim in their names against such administrator and his sureties, our opinion is in his favor. At the time when the bill was filed in 1851, the claim of Mrs. West and her children was not barred, nor presumed to have been satisfied for the balance found to be due them on the settlement made between the plaintiff and Mr. Allen in 1843, which settlement was said to have been based upon an account current furnished by the administrator. See *Davis v. Cotten,* 55 N. C., 430. The plaintiff having made the settlement and paid the money found to be due thereon under a mistake cannot be deemed an officious intermeddler, and is to be considered at least a purchaser for value of the equitable claim of the widow and next of kin of Kenneth West against the administrator and his sureties, and as such entitled in this Court to prosecute the claim for his own benefit against them in the names of such widow and next of kin. As the administrator and his sureties were made parties to this suit, we are not (184) aware of any good reason why the plaintiff may not here have the benefit of his secondary equity against them. A decree may be drawn in accordance with the principles herein declared.

Per CURIAM. Decree accordingly.

Cited: Grantham v. Kennedy, 91 N. C., 157; *McMinn v. Patton,* 92 N. C., 375; *Cedar Works v. Lumber Co.,* 168 N. C., 395; *Bank v. Redwine,* 171 N. C., 564.

HOWARD WISWALL ET ALS. V. JOSEPH POTTS ET ALS. AND THE BANK OF WASHINGTON ET ALS. V. HOWARD WISWALL ET ALS.*

1. In a deed of trust to indemnify sureties by giving them a preference, the debt of the creditor supplies the consideration to support the deed; the creditor's interest is therefore the primary object to be protected in equity, and the sureties' indemnity, though expressed to be first, is but secondary and incidental to the other object.

2. Where a surety intended to be indemnified by a deed of trust made a composition, in writing, with the creditors, by which they agreed to take, and did take, a part of their debt, retaining the right to enforce their claims against others bound for the same debts, but discharging the said debtor from all further liability for the debt, it being left doubtful in the said writing which party should have the benefit of the security afforded by the deed of trust, it was *Held* that the nature and purposes for which the law allows deeds of trust preferring creditors at all are very weighty considerations in determining the question.

3. A steamboat used exclusively for the purposes of navigation between the ports or towns of any State, without going out of the State, is not a vessel of the United States, and is not required to be registered in order to a valid transfer thereof.

4. Where a point in a former suit was pretermitted, which, if tenable, would have determined the judgment of the court the contrary way, it is no ground for impeaching the former judgment that the point was not made in the former suit.

(185) APPEAL from the Court of Equity of BEAUFORT from an interlocutory decree made by *Saunders, J.*

Benjamin F. Hanks being largely indebted to several persons, on 17 September, 1856, executed a deed of trust to Joseph Potts, Richard S. Donnell, and R. L. Myers to indemnify the sureties on these liabilities, conveying much valuable real estate, also considerable personal property, and amongst the rest a steamboat called the Postboy. This deed of trust was registered on 18 September, 1856.

Hanks carried on the business of sawing and planing lumber and of shipping and selling the same and of distilling spirits. These operations were carried on in his own name, but one John Blackwell, who lived in the town of New Bern, was a secret partner in the business. This copartnership was formally dissolved on 23 August, 1856, when Hanks acknowledged a debt due to Blackwell, his partner, of $20,000, and gave five several notes of $4,000, due at different dates, and executed a mortgage deed to secure the payment of the same. This mortgage conveyed to Blackwell much of the same property, which was afterwards con-

*Judge Manly, being a stockholder in one of the banks, made a party in these suits, did not take any part in this decision.

veyed in the deed of trust above mentioned, amongst other things, the steamboat Postboy. At the time of this transaction, John Blackwell was indebted to his brothers, Robert M. Blackwell, Josiah Blackwell, and James M. Blackwell, all of the State of New York, in several sums, amounting to $20,000, and on the day of the dissolution and of the execution of the notes and mortgage, to wit, 23 August, 1856, he assigned the mortgage to them to secure these debts. The deed of trust to Potts, etc., and the mortgage deed and the assignment to his brothers were all registered on the same day, the latter a short time before the other. The debts mentioned in the deed of trust and those to the Messrs. Blackwells (the brothers) are admitted to be just. It was contended, in the suit of *Potts v. Blackwell,* 56 N. C., 449, that the debt confessed by Hanks to John Blackwell, and the mortgage to secure it, were fraudulent, but the Court held that if that had been so, as the assignment to the Messrs. Blackwells was for a full consideration to secure an honest debt, without any notice of such fraud to the assignees, (186) the assignment was valid, and that the property embraced therein, including the Postboy, passed to them, and a decree passed the Court accordingly. The property conveyed in the deed of trust not taken to satisfy the mortgage was sold by the trustees, and the fund in their hands is held subject to the claims of the creditors. The Postboy was also sold by an agreement of the parties and the proceeds held by them, also, subject to the decision of this cause.

The plaintiffs in the first bill, Wiswall, Brooks, etc., are sureties with the defendants to the several banks on the paper of Hanks, and the debts are mentioned in the deed of trust. The clause in the said deed under which they claim is as follows: "To indemnify and save harmless Richard S. Donnell, Howard Wiswall, etc., from all loss and damage by reason of their endorsements and suretyship in several claims, drafts, and notes designated in Class No. 2; and if the funds be not sufficient, then to apply it to indemnify and save harmless the said endorsers and sureties *pro rata.*" They allege that they entered into a composition with the several creditors, the banks of Washington, Cape Fear, etc., by which they agreed to take a part of their debts and to release them from the remainder, and that they paid the sums agreed on in the stipulation, and that they (the banks) each executed a release, of which the following is a copy, viz.: "In consideration that Howard Wiswall has given to Martin Stevenson, cashier of the Bank of Washington, his notes in the aggregate amount of $8,817.37, payable in one, two, three, and four years after date, each one bearing interest from date and each note dated 1 January, 1857, the said Martin Stevenson, cashier of the said Bank of Washington, does hereby remise, release, and forever discharge the said Howard Wiswall from all further liability, claim, or

demand against him for and on account of his having become surety to B. F. Hanks upon any bills or notes due the said Bank of Washington, retaining, nevertheless, full right to proceed in any way against the said Hanks and all cosureties with the said Wiswall in said notes or (187) bills of said Hanks, and to collect and retain the full residue of all claims against him and them as fully as if this discharge were not given. 24 February, 1857."

The plaintiffs insist that by virtue of this release they are entitled to their share of the trust fund to indemnify them for the sums they have paid and secure to the said banks as sureties of B. F. Hanks, and that that was the understanding at the time the composition was entered into, and they pray that the trustees may account and pay over to them whatever they are entitled to on this agreement.

The banks, who are the defendants in the first suit and plaintiff in the cross-bill, protest against the claim thus set up by the sureties. They insist that it was not the meaning or intention of the paper-writing referred to to secure anything to the said parties by way of indemnity; that it was well known that the amount paid and secured to be paid by Wiswall, etc., would be short of satisfying the claim with what might be made for the creditors under the deed of trust, and that it was by no means the understanding of the parties or the intention of the instrument that they should give up to the sureties what they could or might be able to realize under the deed of trust. The cross-bill prays for an account with the trustees, and that in taking such account the money in their hands for the sale of the Postboy may be allowed to the claimants under the deed of trust. It was insisted by both Wiswall and Brooks in their bill and by the banks in their cross-bill that the steamboat called the Postboy, not having been registered, was not conveyed by the mortgage, etc., according to the act of Congress, and that nothing passed by it to the Blackwells. The sureties intended to be indemnified, the banks whose debts are intended to be secured, and the trustees and B. F. Hanks, John Blackwell, and the Messrs. Blackwell of New York, are made parties both to the bill and cross-bill.

The question raised being the same in each suit, they were heard together upon the pleadings, former decrees, and the exhibits, one (188) of the latter of which was the certificate of the enrollment of the Postboy at the custom house at Washington.

In the court below, his Honor decreed in favor of the banks, and that the sureties were not entitled to have anything for their indemnity until the whole of the debts were satisfied, and that no title passed to John Blackwell by the mortgage. The plaintiffs in the first bill (Wiswall, etc., and the defendants the Messrs. Blackwells) appealed to this Court.

Warren for plaintiffs Wiswall, etc.
Rodman and Shaw for banks.
Fowle for Blackwells.

PEARSON, C. J. 1. As to the legal effect of the release. Is the surety who paid part of the debt entitled to receive the dividend under the deed of trust for his entire indemnity, or is the creditor entitled to receive the dividend, to be applied to the payment of the residue of the debt?

The Court is of opinion that the creditor is entitled to the dividend. The question depends upon the construction of the deed of trust, and this must be arrived at not merely by a consideration of the words used in the instrument, but of its nature and the purpose for which and the extent to which the law allows such conveyances to be valid against creditors. The words in which the trust is declared are "to indemnify and save harmless Richard Donnell, Howard Wiswall, etc., from all loss or damage by reason of their endorsements and suretyship in the several claims, drafts, and notes designated in Class No. 2; and if the fund be not sufficient, then to apply it to indemnify and save harmless the said endorsers and sureties *pro rata.*" Judging by these words, there could be no doubt that the purpose of the debtor was to declare a trust in favor of his sureties, and he seems not to have bestowed even a passing thought upon his *duty* to the *creditors* whose money he had obtained. But the law supplies this want of a proper sense of justice on his part, for it does not tolerate a voluntary conveyance by a debtor as against creditors, and will not allow him to put his property out of their (189) reach by conveying it in trust to provide against some contingent event before the happening of which there is no debt. In the case of a surety, it may be he will never pay the original creditor so as to become a creditor himself, for he may be insolvent or may, in like manner, put away *his* property in trust for a surety, and thus the actual creditor will be hindered, delayed, and defrauded. So that in order to make this deed valid, it is essential that the debt of the creditor shall supply the consideration to support it, consequently the creditor must be considered the primary object of the trust, and the indemnity of the surety is secondary, to follow, as an incident, the payment of the debt to the creditor out of the funds which his debtor has provided. It is only upon this principle that such deeds are supported by the adjudications of our courts, which are opposed to the English decisions, where such deeds, even those made expressly in favor of creditors, are treated as voluntary. See *Ingram v. Kilpatrick,* 41 N. C., 463. It was decided in *Jackson v. Hampton,* 30 N. C., 457, "a deed of trust for land which has no consideration except that the land should be sold for the payment of debts for which the bargainee was bound as surety of the bargainor will

not operate as a bargain and sale." This is a rule in a court of law, and equity cannot support such a deed even though a nominal consideration of one dollar be expressed in order to pass the legal title unless there be a substantial consideration, which can only be supplied by the creditor, who thereby is made the party entitled to receive the proceeds of the trust fund, as we have decided at this term, *Murphy v. Jackson, ante,* 11; see, also, *Ferrer v. Barrett,* 57 N. C., 455. So the plaintiff must be content, in order to prevent the deed from being treated as fraudulent, to take a back seat and be considered secondary to the creditor who supplied the consideration, which construction is adopted by the courts for the purpose of giving effect to the right of a debtor to make a preference among his creditors, provided he does so honestly. In the view we take of the question, the plaintiff would not be entitled to claim the
(190) benefit of the deed of trust unless the release had contained a clause expressly assigning it to him.

2. This Court is of opinion that the creditors are entitled to a dividend of the trust fund according to the amount of the debts, and that no notice can be taken, in making the division, of the subsequent arrangements which any of the creditors have been induced to make in case of the sureties. That is a matter between them, which in no way prejudiced the rights of the parties and in which they can take no benefit. In other words, it is a matter in which they have no concern. Should the dividend received in any instance be so large as to leave an excess after satisfying the debt, by including the amount accepted upon giving the release, the surety will be entitled to such excess as a sum justly applicable to his further indemnity, according to the proper construction of the deed of trust.

3. The defendants, the Blackwells, are entitled to the fund arising from the sale of the steamboat, which was sold under an agreement of the parties concerned. This conclusion is supported on two grounds. After the boat became the property of Hanks, it was used exclusively for the purposes of inland navigation in the waters of this State; it was consequently a North Carolina boat and not a vessel of the United States within the operation of the act of Congress passed in pursuance of the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." This clause in the Constitution of the United States, it is admitted, by necessary implication, comprehends "navigation also," and confers a power on Congress to pass an act requiring all vessels trading with foreign nations and from State to State to be recorded in the custom house, but it does not embrace a vessel or boat going from place to place within any one State, for that is a matter which concerns the State alone, as is settled by the case of *Gibbon v. Ogden,* 9 Wheaton, 197. So the Postboy was not a vessel of

the United States, but a boat of the State of North Carolina, to which the act of Congress had no more application than the boats plying from Wilmington to Fayetteville, or from Washington to Green- (191) ville, or from Edenton to Plymouth.

But it is said Hanks, while he was the owner, did register the boat under the name of the "Postboy" in the custom house, and it was by the force and effect of this registration made a vessel of the United States. We are unable to see how that consequence follows. It may be that Hanks did so under the expectation that he might afterwards send the boat to another State and wished to provide for the contingency, but he in fact never did so, and of course the act of registration was a mere matter of supererogation. It is the fact that a boat trades to two or more of the States or to a foreign country which makes it a vessel of the United States, and the act of registration in the custom house is an *incident* necessary to give it the privilege conferred thereby. But so long as it remains in the State and never goes out of its jurisdiction, the law in regard to the transfer and devolution must depend upon the laws of the State, for it is strictly a *State right* to make rules and regulations in respect thereto. And so far as registration is concerned, as that was unnecessary while it remained a vessel of North Carolina, it might with as much force be contended that the fact of registering a bill of sale for a horse would enable the party to read in evidence a copy from the register's book under the act of Assembly.

But in the second place, we think that the plaintiff is concluded by the decree in the former suit, which is set up by the answer as a bar. The steamboat is expressly referred to in the opinion then delivered, and the question suggested how far the plaintiffs could assert the right of a subsequent purchaser under the statute 27 Elizabeth, and the decree embraces it as well as the other property mortgaged to the Blackwells. To the suggestion that the want of registration in the custom house was not drawn in issue in that suit, the reply is: it either was or ought to have been, for if it could not have been drawn in issue in that suit, there is no additional reason why it can in this. The object there was to put the mortgage out of the plaintiff's way, and could have been (192) done as well then as now upon sufficient ground being shown. There must be an end of litigation.

PER CURIAM. Decree accordingly.

Cited: Bank v. Jenkins, 64 N. C., 732; *Harrison v. Styres,* 74 N. C., 295; *Mast v. Raper,* 81 N. C., 335; *Matthews v. Joyce,* 85 N. C., 266; *Ijames v. Gaither,* 93 N. C., 363; *Sherrod v. Dixon,* 120 N. C., 64, 67; *Blanton v. Bostic,* 126 N. C., 421.

Dist.: Lawrence v. Hodges, 92 N. C., 679.

WILLIAM FULLER v. JERRY SMITH, ADMINISTRATOR OF JAMES WISDOM, HENDERSON SMITH, AND OTHERS.

1. Where a bill, seeking to attach an equitable interest of an absent debtor, in the hands of an administrator in this State, states that the defendant "is justly indebted to the plaintiff in the sum of $218.17, due by two notes bearing date 20 March, 1850," it was *Held* a sufficient statement of the debt within the requirements of chap. 7, sec. 26, Rev. Code.

2. Where a resident of another State endorsed a note to a citizen of this, it was *Held* that the law would presume, in the absence of proof to the contrary, that the endorsement was for the endorsee, and that he might attach the property of the maker, a nonresident, in the hands of an administrator in this State for its satisfaction.

3. An admission of a fact made in the court below by the parties to a suit for the express purpose of saving the trouble and expense of taking the proof will be taken as sufficient here, as well in suits by attachment as in other actions.

4. Where a defendant in a suit claimed an equitable interest by virtue of a deed of assignment which recited that the conveyance was in consideration of the sum of $100 in hand paid, but there was no evidence of the payment of the purchase money, except this recital, although such proof was expressly required, and the defendant in his answer did not distinctly aver that it had been paid, it was *Held* that the court would not regard the defendant as an assignee, so as to defeat the claim of the plaintiff, who was seeking to attach this fund for the satisfaction of a just demand.

CAUSE removed from the Court of Equity of CASWELL.

The bill is filed under the statutes, Rev. Code, chap. 7, secs. 20 to 26, inclusive, to subject the estate of a nonresident debtor in the hands of an administrator. It appeared from the pleadings that James (193) Wisdom died intestate, in the State of Missouri, about 1854, without wife or issue surviving, and by the law of that State the defendant William Wisdom, his father, became entitled to his estate as sole distributee; that the said intestate, James Wisdom, at the time of his death, was entitled to a distributive share of the estate of one Abner Wisdom, who died intestate in the county of Caswell; that the defendant Jerry Smith, at January Term, 1857, of Caswell County Court, was appointed administrator of the said James Wisdom, and, having qualified, received of the administrator of Abner Wisdom the distributive share due his intestate James, amounting to $214. The bill alleges that the defendant William Wisdom "is justly indebted to the plaintiff in the sum of $218.17, due by two notes bearing date 20 March, 1850, with interest from date," and it seeks to attach the fund in the hands of the defendant Smith for the satisfaction of this claim. Upon the production of the notes, it appeared that one of them was made payable to the plaintiff and the other to one William Hightower, and endorsed by him to the plaintiff, both notes bearing the same date—20 March, 1850. It

was admitted that Hightower, the payee in one of these notes, was a citizen of the State of Tennessee; and there was no evidence that the note was endorsed by him to plaintiff as agent or attorney, excepting that Hightower said in the presence of a witness that he would put this note into the hands of the plaintiff to collect for him. It was expressly admitted by the counsel in the court below that at the time of filing the bill the defendant Wilson had not enough property or effects in this State upon which an attachment at law could have been levied to satisfy plaintiff's debt.

The plaintiff's claim was resisted by the defendant Henderson Smith, who claimed title to the equitable interest in dispute by virtue of an assignment made to him by the said William Wisdom on 18 September, 1856, in the State of Missouri. The following is a copy of the deed:

"Know all men by these presents, that I, William Wisdom, of the county of Randolph and State of Missouri, for and in consideration of $100 to me in hand paid, the receipt whereof is hereby (194) acknowledged, have this day sold, and by these presents do grant, bargain and sell unto Henderson Smith, of the county and State aforesaid, all the right, title and interest which, as legatee or devisee, I may have in and to the estate of Abner Wisdom, deceased, late of the county of Caswell, State of North Carolina, and authorize him, etc.; also, all my right, title and interest in the estate, money, etc., bequeathed by said Abner Wisdom, deceased, to my sons William T. and James J. Wisdom, both of Cooper County, in the State of Missouri, and I authorize him to sue for and receive any and all moneys, estate and property of whatever character to which they would be entitled if living. In witness, etc.

"WILLIAM WISDOM. (SEAL)

"Test.: TURNER WISDOM."

This deed was duly proved by one Willie, who deposed to the handwriting of the grantor therein.

The answer of defendant Henderson Smith states "that on 18 September, 1856, the defendant William Wisdom conveyed to this defendant by deed properly executed in the county of Randolph, State of Missouri, for the sum of $100, all his right and interest in the county of Randolph, State of Missouri, for the sum of $100, all his right and interest in the fund mentioned in the bill." There was no evidence of the payment of the purchase money except the recital in the deed, although the defendants were notified that such additional proof would be required.

The bill seeks to have this conveyance set aside as being a fraud upon the plaintiff, or to have the grantee declared a trustee for him. It was agreed by the counsel in this case as to the amount of the fund in dispute. The bill was duly sworn to, but the answer of defendant Henderson Smith was not.

Fowle, Hill, J. W. Graves, and Bailey for plaintiffs.
Norwood, Winston, and Kerr for defendant.

(195) BATTLE, J. The bill is filed under the act of 1852, chap. 50, which is embraced in the Rev. Code, chap. 7, secs. 20 to 26, both inclusive, and its purpose is to attach the personal effects of the defendant Wisdom, an absent debtor, in the hands of the defendant Jerry Smith, who is the administrator of a deceased son of the said Wisdom, and to subject them to the payment of a debt claimed to be due to the plaintiff as a resident creditor. The defendant Henderson Smith was made a party because he claimed to be a purchaser for value of the interest of the defendant Wisdom in the estate in question before the filing of the bill, and the plaintiff seeks to impeach the conveyance made to him on the ground of fraud, or to convert him into a trustee on account of the circumstances under which his alleged purchase was made.

The counsel for the defendant, in this Court, resist the claim upon four grounds, which we will consider in the order in which they have been presented to us:

1. The first ground of exception is that the debt or demand of the plaintiff is not stated in his bill with the truth and accuracy which the law requires. This objection is founded upon section 26 of the act referred to, which is in the following words: "The plaintiff shall state specifically his debt or demand as near as he can, and shall make affidavit of the truth of the matters contained in his bill, according to his information and belief." The bill states that the defendant Wisdom is indebted to the plaintiff "in the sum of $218.17, due by two notes bearing date 20 March, 1850, with interest from date," and the truth of the matters set forth in the bill is sworn to by the plaintiff according to the best of his information and belief. So far as the statements of the bill are concerned, it seems to us that the requisition of the act has been strictly complied with. The amount of the debt is specified, and the manner in which it was secured is described with such particularity that there is no danger of mistaking it. When the notes are produced and proved, it appears that one of them was made payable to the plaintiff himself and the other to one Hightower, and by him endorsed to (196) the plaintiff; but, in substance and legal effect, the latter as well as the former was due to the plaintiff at the time when his bill was filed, and the statement was true that the defendant was indebted to him in the amount of the two notes, and they were sufficiently described by that amount and by the date on which they were given.

2. The second objection is that the remedy provided in the act is confined to creditors residing in the State, and cannot be availed of by a citizen of the State as a mere agent, attorney, or trustee for a nonresi-

dent creditor. This objection is based upon the supposition that the plaintiff was acting, as to one of the debts, as the agent or attorney of Hightower, who it was admitted was a citizen of Tennessee. We are inclined to think the objection would be a good one if it were supported by the facts. The note in question was undoubtedly at one time due to Hightower, and to him alone, and the testimony shows that he then claimed it and spoke of taking steps to have it collected; but we afterwards find it endorsed to the plaintiff, whereby the legal title was clearly transferred to him. There is no evidence that it was not endorsed to him for his own benefit, except that Hightower at one time said in the presence of one of the witnesses that he would leave it with the plaintiff to be collected for him. It does not appear that the latter agreed to receive it for any such purpose, or that he knew that Hightower wished him to do so. We find him in the possession of the note with the ordinary legal evidence of being the owner, and we think the presumption must be, at least for the purposes of this suit, that he is the owner in equity as well as at law until the contrary is shown.

3. Another objection is that the plaintiff has not proved to the satisfaction of the court that the debtor had not in the State, at the filing of the bill, enough estate on which an attachment at law might have been levied to satisfy his debt or demand, as is required by section 24 of the act. This fact was expressly admitted in the court below by the counsel for the defendant, and yet his counsel in this Court insists strenuously that such admission cannot dispense with the requisition of (197) the act—that the fact must be proved. We cannot agree for a moment that the admission of the counsel of a party to a suit, made for the purpose of dispensing with the trouble and expense of obtaining proof of a fact, is not to be deemed satisfactory to the Court. In most other kinds of suits it is conceded that such an admission would be taken as sufficient proof. See Greenleaf on Ev., sec. 189. But it is said that suits by attachment are not favored by the courts, and that the proceedings in them are to be construed with great strictness. They are compared in this respect with suits for divorce and alimony, where the facts are required to be submitted to and passed upon by a jury, "upon whose verdict, and not otherwise, the court shall decree." But there is an obvious distinction between cases of that kind and the present. In suits for divorce collusion is feared, and is, therefore, specially guarded against; but in attachment suits such collusion is about the last thing that is to be apprehended, and the admission made by counsel in them is no more to be rejected than it would be in any suits other than those for divorce and alimony.

4. The fourth and last objection is made on behalf of the defendant Henderson Smith, who insists that he is the purchaser, for value, of the

interest of the defendant Wisdom in the estate of the deceased son, which interest the plaintiff is now seeking to subject to the payment of his debt. The evidence of this purchase is a deed of assignment executed in the State of Missouri on 18 September, 1856, and purporting to be made in consideration of the sum of $100 to the grantor in hand paid, the receipt whereof is thereby acknowledged. The recital in the deed is the only evidence of the payment of a consideration. Is that sufficient? We think that under the circumstances it is not. The answer of this defendant—the truth of which is not verified by affidavit, though it has not been objected to on that account—does not distinctly aver that any money or money's worth was paid as the price of the interest assigned to him. It states only that the defendant Wisdom conveyed to
(198) him the interest in question "by deed properly executed in the county of Randolph, State of Missouri, for the sum of $100." Whether that sum was actually paid in cash or was only secured to be paid by a promissory note or other security for money is not alleged. It is clearly proved that this defendant knew of the debt due to Hightower and promised to collect or secure it for him before he procured the assignment under which he now claims the interest for himself. On this account the plaintiff insists that if the assignment be sustained the assignee ought to be held in this Court to be a trustee for him as the endorsee of Hightower. But we cannot regard the defendant Henderson Smith as an assignee at all until he proves by other evidence than the mere recital in his deed that he paid the price therein mentioned. He was fully apprised that such additional proof would be required, for it appears from an agreement of counsel made at the December Term, 1858, of this Court, which is filed among the exhibits in this cause, that the suit was continued for the express purpose of allowing this, among other proofs to be made, but none such has been made either by the admission of counsel or otherwise, and we are, therefore, obliged to conclude that this defendant did not pay any consideration for his alleged purchase. The result is that the conveyance executed by the defendant Wisdom to him cannot have the effect to prevent the plaintiff from having a decree for the satisfaction of his debt out of the effects in the hands of the defendant Jerry Smith as the administrator of James Wisdom, to which the defendant William Wisdom is entitled as sole next of kin of the intestate. The decree must be made upon the terms prescribed in sections 21 and 22 of chapter 7 of the Revised Code.

PER CURIAM. Decree accordingly.

(199)

WILLIAM H. A. KEARNEY v. A. HARRELL ET ALS.

1. Where A., B., and C. signed a bond, and C. paid off a judgment rendered thereon and took an assignment of it to his own use and sought to collect the whole of it of B., whom he alleged to be a coprincipal with A., who was insolvent, and B. filed a bill to restrain C. from collecting more than a proportional part of said judgment on the ground that he, (B.) was only a cosurety with C., and C. confessed in his answer that he signed the bond without any request by B., or any communication with him respecting it, but upon the assurance of A. that B. was a coprincipal, it was *Held* that the *onus* devolved upon C. to prove that B. was a coprincipal.
2. Where a cause is set for hearing upon bill, answer, replication, and proofs, and the evidence fails as to a matter essential to the equity of the plaintiff or to the defense relied on, it is not in the course of the court to direct an inquiry by the master, nor to direct an issue to be tried at law.

CAUSE removed from the Court of Equity of WARREN.

The bill is filed to obtain an injunction to restrain the defendant from collecting the full amount of a judgment, and alleges the following facts as a ground for equitable interference.

The defendant Abner Harrell, at November Term, 1855, of Warren County Court, obtained a judgment upon a bond payable to him as guardian of certain children, against one Albert Jones as principal, and the plaintiff Kearney and one Perry Carter, who is also a defendant, as sureties. That the said Albert Jones, at the time of the rendition of this judgment, was entirely insolvent, and is still so. That Carter, a surety, has since caused the judgment to be assigned to a third person for his use, and in order to avoid paying his proportional part of said debt has caused a writ of *fi. fa.* to issue upon this judgment against the plaintiff, and has directed the sheriff to collect the whole amount from him. That this writ of *fi. fa.* was issued in the name of Harrell, but was in reality for the use and benefit of the said Carter, who has obtained the control, and the bill prays an injunction to restrain him from collecting more than a proportional part of the amount of the judgment—*i. e.*, one-half.

The defendant Carter denies in his answer that the bond upon which the judgment was obtained was executed by Jones as principal and himself and plaintiff as sureties, or that any such relations (200) existed between them as to make them cosureties, but on the contrary gives the following as the true state of the facts: That the defendant Jones and the plaintiff Kearney, in the year 18....., contracted with certain persons in the town of Murfreesboro to erect a large brick building to be used as a female academy; that the direction of the work was left entirely to Jones, who resided in the town, Kearney only occasionally visiting the place while the work was going on, but continuing to

furnish hands and in other ways contributing to the prosecution of the work; that Jones, among other debts contracted in this joint undertaking of himself and plaintiff, hired certain negroes from the defendant Abner Harrell, until their hires amounted to about $500, and he (Jones) then called upon the defendant Carter with the bond referred to, with the signature and seal of Kearney, and requested him to sign it as surety, saying that it was to pay for the hire of slaves that had worked at the college building in which himself and Kearney were concerned and to obtain money to pay off other debts contracted at that work; that Kearney and himself were principals, and that in becoming surety for them both he would incur no risk. Upon these representations, being satisfied of the responsibility of Kearney, he agreed to become a surety, and executed the bond accordingly, subscribing it after both Jones and Kearney. The following is a copy of this bond:

"$1.000.

"Two days after date, we promise to pay Abner Harrell, guardian for Mary E. Harrell and James Abner Harrell, the just and full sum of $1,000, it being for value of him received.

"Given under our hands and seals, this 1 January, 1855.

"Witness: "WILLIAM H. A. KEARNEY. (SEAL)
"A. G. JONES. (SEAL)
"PERRY CARTER. (SEAL)"

(201) The plaintiff offered the deposition of one P. W. Motley, who deposed that A. G. Jones before this handed him a bond for $1,000 to carry to Abner Harrell, signed first by A. G. Jones and then by Kearney and Perry Carter, but he did not know which of the latter two signed it first; that Jones told him to get the money for the bond; that he carried the bond to Harrell, who refused to receive it because the names of the obligors were not written opposite the seals on the said bond; that he then carried the bond back to Jones, who gave him the bond above recited, and asked him to carry it to William H. A. Kearney for his signature; that he carried it to him, and he put his signature to the third seal on the bond, and that at the time there were only three seals to the bond; that he then carried the bond back to Jones, and did not know who was the principal and who the sureties to the first bond.

The defendant Carter filed as an exhibit an account rendered by the firm of Little & Bridger against Jones & Kearney for lumber, and at the foot of this account was a receipt for $260, signed by J. D. Bridger, and reciting that the money had been paid by W. H. A. Kearney, and on the back of it is the certificate of Jones that the lumber was used in building the academy at Murfreesboro.

At the coming in of the answer, the injunction previously granted in the case was ordered to be dissolved, and the bill being continued as an original, on replication and proofs being taken, the cause was set down for hearing and sent to this Court.

Eaton and B. F. Moore for plaintiff.
Batchelor for defendant.

PEARSON, C. J. The plaintiff alleges that he executed the bond on which the judgment in question was obtained as a surety of the defendant Jones, and complains that Carter, who also executed the bond as a surety of Jones, having obtained control of the judgment by taking an assignment to his use, is about to collect the whole of it from him. Carter does not aver that he executed the bond at the request of (202) Kearney, but says he did so under the belief that he was becoming the surety of both Kearney and Jones, because Jones told him that such was the fact, and that the bond was given to Harrell, in part, to secure the payment of the hire of certain slaves who had worked on the female academy at Murfreesboro and in part for money to pay debts contracted for the purposes of the building, and that he and Kearney were copartners in the contract for erecting the building.

Upon the coming in of the answer, the injunction is dissolved and replication taken. The plaintiff files as an exhibit the bond, by which it appears that it was drawn with three seals, and that Kearney had affixed his signature to the *last seal* and Jones and Carter had then put their names underneath with *new seals*. He also offers the deposition of one Motley, who deposes that Jones handed him a bond for $1,000, signed first by Jones and then by Kearney and Carter, and directed him to hand it to Harrell and get the money for it. Harrell refused to accept it because the names were not written opposite the seals. He returned it to Jones, who afterwards handed him the draft of the bond above referred to for $1,000, and directed him to carry it to Kearney for his signature. Kearney put his name to the *third* seal and deponent handed it to Jones.

The defendant Carter files as an exhibit an account rendered by one Little & Bridger against Jones & Kearney for a quantity of lumber, with an entry at the foot, "Received of W. A. Kearney, $260, in part of the above. 23 March, 1856." (Signed) Little & Bridger, on which the defendant Jones has written a certificate that the articles were used in the building of the female academy at Murfreesboro. Upon this evidence the cause is set for hearing and transferred to this Court.

Upon the argument here, it being manifest that there was a defect of proof, the case was put on its merits, but on the effect of the answer and on which side lies the burden of proof.

(203) The counsel of Carter are mistaken in supposing that his answer put the plaintiff under the necessity of proving that he was *not a principal* in the bond. On the contrary, as Carter admits that he executed the bond without any request on the part of Kearney or any communication with him in respect to it and upon the mere request of Jones and upon his representation of the matters connected with it, these affirmative matters, from which he insists that Kearney is by implication a principal, must be proven by him, for otherwise there is nothing except the naked representation of Jones—upon which it was his folly to rely—to support the imputation that Kearney was a principal. The exhibit Little & Bridgers' account rendered is not competent evidence. So Carter has offered no evidence of the affirmative matter alleged by him as a ground for the inference that Kearney was a principal, and that he (Carter) has the rights of a surety in respect to him, notwithstanding his admission that he executed the bond at the instance of Jones and without any request on the part of Kearney. Being reluctant to decide a case on the ground that no evidence was offered when the party apparently relied on the effect of his answer, we were at first inclined to have an inquiry, or to direct "issues" to be tried at law, but on reflection and after a full search for a precedent, which we were unable to find, our conclusion is that when parties set a cause for hearing on a bill, answer, replication, exhibits and proofs, and the evidence fails as to a matter essential to the equity of the plaintiff or to the defense relied by the defendant, and not simply to a matter *collateral* and secondary to the relief or defense, it is not in the course of the Court to direct an inquiry by the master nor to direct an issue to be tried at law which is intended, not to support a *want* of testimony, but to relieve the Court where there is a *conflict* of testimony, nor to direct an action to be brought which is done when the matter is properly cognizable at law, but for some cause the aid of this Court is invoked, not because of an original equity, but because of some impediment which would prevent or interfere with an action at law unless the parties were put
(204) under the direction of this Court in respect to the exercise of legal rights and defenses arising from accident, fraud, surprise, etc., of which it is against conscience to take advantage.

It must be declared that the defendant Carter did not become the surety of the plaintiff at his instance or request, and that the defendant Carter has failed to prove that the plaintiff was concerned or bound as a principal in the bond by reason of any benefit which he was to have under it.

PER CURIAM. The plaintiff will have a decree for the one-half of the amount which he has been forced to pay, with interest and his costs.

HIRAM WARD v. ELISHA SMITH.

Where a plaintiff has an equity to enjoin the enforcement of a part of a judgment, but for the purpose of obtaining an injunction as to the whole alleges a ground of relief which is false in fact, and relies upon it alone, it was *Held* that a court of equity will dissolve the injunction as to the whole of the judgment.

APPEAL from an order of the Court of Equity of DAVIDSON, containing an injunction; *Dick, J.*

The bill states that about 1842 or '43 the plaintiff purchased of William Lanier and Jackey, his wife, their right and title to a tract of land containing 160 acres, in the State of Arkansas; that Lanier and wife held under a patent issued to her as the sole heir of William Church, deceased, who served in the army of the United States; that in the spring of 1853 the defendant Smith, who was a general pension agent, applied to him to purchase this land; that plaintiff informed him that he had never seen the land and did not know its value, nor did he know whether or not his title was good; that defendant, having exam- (205) ined his title deeds, offered plaintiff $50 for his title just as it was; that a contract was entered into on these terms, and plaintiff executed a bond in the sum of $500 to make title in the manner above set forth; that defendant paid him the purchase money ($50) and prepared a deed containing a covenant of seizin, and reciting the consideration to be the sum of $500, instead of $50, the true sum; that he procured the plaintiff to sign this deed without having read it or without having heard it read; that the plaintiff is a poor scholar, being barely able to write, and can scarcely read writing at all, and he relied implicitly upon the defendant in the preparation of the deed, and knew nothing of the covenant for seizin nor the misrecital of the price contained in the deed until the defendant commenced an action at law against him for a breach of warranty; that said action at law was tried at Fall Term, 1858, of Davidson, and the defendant in the present suit recovered a judgment against the present plaintiff for the consideration of said deed and interest thereon for five years and a half, amounting together to the sum of $665, having proved on the trial that the land had been sold for taxes many years before and a good title acquired by the purchasers. Upon these facts alleged, the bill prayed an injunction to restrain the defendant from proceeding further on this judgment.

The answer denies that the defendant sought the plaintiff with the view to purchase the land, but avers that he did so at the earnest request of the plaintiff, who informed him that he had a good fee-simple title to the land; would make the defendant a good right and title to the same, and that the land had not been sold for taxes; that upon these

representations and assurances, the bargain was closed at the price of $110, instead of $50, as stated in the bill, and the answer utterly denies that the defendant was to take the title at his own risk; that defendant wrote a bond in the presence of plaintiff agreeable to his assurances, covenanting that he (plaintiff) had a good title, and that he would convey the same to the defendant on the payment of the rest of the
(206) purchase money, and the sum of $500 was agreed upon and inserted in the bond as the penalty of a failure to make defendant a good title; that the bond was then read over to the plaintiff, or read by him, and he signed it. The defendant further denies that the plaintiff is a poor scholar, but avers that he writes a good hand and reads writing well; that he has transacted a good deal of business and is a shrewd business man.

The defendant further avers that in April, 1853, he met plaintiff, paid off the residue of the purchase money, and prepared a deed in accordance with the title bond, and containing the same covenants of seizin; that the sum of $500 was inserted in the deed as the consideration, it being the sum which, according to the bond, the plaintiff was to forfeit if he failed to make a good title to the land; that it was not true that this consideration was inserted in the deed without the knowledge or consent of the plaintiff, but in addition to the purpose above stated was inserted to improve the sale of the land by making it appear upon the face of the deed to be valuable; that this deed was handed to the plaintiff and read by him, and that plaintiff and defendant talked over its contents before the former signed it. The defendant entirely disclaims any intention to defraud the plaintiff.

Upon the coming in of the answer a motion was made to dissolve the injunction, which motion was refused, and defendant appealed.

J. H. Bryan for plaintiff.
McLean and Starbuck for defendant.

PEARSON, C. J. The plaintiff puts his equity on the ground that he contracted to sell only his interest in the land, and the defendant was to take his title, "such as it was," without warranty and at his (the defendant's) risk, and that the defendant fraudulently prepared a deed containing a warranty and induced him to execute it without reading it or having it read to him. He further alleges that for the purpose
(207) of making the fraud more oppressive the defendant inserted as the consideration the sum of $500, instead of $50, which was the price paid. The prayer is for an injunction as to the whole amount of the judgment recovered on the warranty, and the fiat is accordingly made to cover the whole judgment on the ground that the warranty was fraudulently inserted in the deed.

The defendant avers that by the contract, the plaintiff was to execute a deed with warranty, and that the deed containing a warranty was read over to him and then handed to him, and he read it over and executed it with a perfect knowledge of its contents. As respects the consideration, the defendant avers that, although the price paid was $110, and not $50 as alleged by the plaintiff, yet the bond which the plaintiff had previously executed was in the sum of $500 to make a good title in fee simple, and in preparing the deed that sum was inserted as the consideration, being the amount in which the plaintiff had bound himself for the title and for the additional purpose of enabling the defendant to resell to better advantage; but he says this was done with the knowledge and consent of the plaintiff, and that "the contents of the deed was talked over between them" and compared with the terms of the title bond before the deed was executed.

If the bill had been framed with a view of setting up a limited equity because of a misconception under which the parties mutually labored in respect to the effect of the consideration inserted in the deed, and if the warranty was to have been a "covenant of quiet enjoyment," and not "a covenant of seizin" (for in the latter the question of damages is an open one, the rule that the price paid is the measure of damage only applying to the former in analogy to the old "covenant real" in which *other land* of *equal value* was recovered on voucher, *Williams v. Beaman,* 13 N. C., 483), it is probable the plaintiff could have made out an equity to enjoin the judgment, except as to the amount of the price paid and interest. But as the bill is framed on the ground that there was to be no warranty, and that its insertion was a "foul fraud" practiced by the defendant, the plaintiff must stand or fall on that ground, (208) what is alleged in regard to the consideration being only matter of inducement, for if there was to have been no warranty, the amount inserted as the consideration was wholly immaterial so far as liability of the plaintiff was concerned.

Taking the plaintiff's equity on the broad ground upon which he has put it, the answer is fully responsive and directly denies the allegations on which it rests, and the injunction ought to have been dissolved.

PER CURIAM. Decretal order reversed.

HENDERSON SIMPSON v. M. B. SPENCE AND WIFE ET ALS.

1. Where a testator gave certain property to his wife for life, and after her death in trust for the children of one of his sons, to be divided among them as they come to age, it was *Held* that all the children born before the eldest arrived at age were entitled to share in the property.

2. Where a testator gave property to children, as a class, and directed the profits to be "applied annually to their use," it was *Held* that at the division of the property the surplus rents and profits should be so divided that each child should get only a *pro rata* share of what had accrued since its birth.

CAUSE removed from the Court of Equity of CHOWAN.

Exum Simpson, of the county of Chowan, died in said county in 1844, leaving a last will and testament in which he devises and bequeaths all his property, real and personal, to his wife, Margaret Simpson, for her life, and after certain specific devises and bequests, he proceeds in the twelfth section of said will as follows: "It is my will and desire that the remainder of my estate, after the decease of my wife, shall be laid off in nine parts, as equally as may be, seven of which shall be equally divided among my sons (naming them) and the other two
(209) parts to be taken and held in charge and care of my son, Henderson Simpson, one of the parts for the use and benefit of the children of my daughter, Mary Whidbee, lawfully begotten of her body, the proceeds, if any, to be annually applied to their use and the principal divided among them as they come to age. One other part to the use and benefit of my son Richard D. Simpson's children, the proceeds, if any, to be annually applied to their use and the principal among them as they may arrive at age."

It appears that at the death of the testator Exum, Richard D. Simpson had two children—Emily Ann, who intermarried with the defendant M. B. Spence, and Mary Elizabeth, who intermarried with defendant J. H. Garrett—and that at the time of the death of Margaret Simpson, the tenant for life, the wife of Richard D. Simpson was *enciente* with a third child, Sarah Jane Simpson, who is one of the defendants in this suit; and further, that two other children, to wit, Martha Virginia and Elizabeth Rebecca, were born to the said Richard D. Simpson before his eldest child, the said Emily Ann, attained the age of 21, which she did on 16 January, 1859.

The plaintiff, the trustee, avers in the bill that the executors have assented to this legacy, and that he has the same in his hands ready to pay it to whomsoever may be entitled, and prays the instruction of the court as to his duty in the premises. He prays to be informed whether the fund is to be divided between the two children born at the death of the testator alone, or whether the child with which the wife of Richard

Simpson was *enciente* at the death of the tenant for life is entitled to a share, and if so, whether the two born since that time, but before the eldest came of age, is also entitled to like shares. He also prays to be informed whether, if they all take, he is, in the division of the rents and profits, to divide the same among them all without reference to the time of their births, or whether each shall receive a *pro rata* share of the rents and profits accruing since her birth.

Hines and William A. Moore for plaintiff. (210)
H. A. Gilliam for defendant.

MANLY, J. If the bequest of Exum Simpson for the benefit of the children of his son Richard had been directly to them as a class, without the creation of any intermediate particular estate, the property, in seeking an ownership upon the death of the testator, would have vested absolutely in such of the children of Richard as might then be in being. But inasmuch as it is a settled rule of construction, based upon justice and the presumed intention of every testator to include as many as can be consistently with rules of law within the class, it will follow that if there be an intermediate estate after which the remainder is limited to the class, all who shall come into being before the termination of the intermediate estate will be counted as objects of the testator's bounty. And so, in conformity again with this governing rule of construction, if there be not only an intermediate estate, but the remainder be put in trust for the class and made divisible as the individuals shall, respectively, arrive at 21 years of age, all of the class will take who shall have been born before the period for division arrives. *Knight v. Knight,* 56 N. C., 167; *Clark v. Clark,* 11 Con. Eng. Chan., 318; *S. c.,* 8 Simons, 59.

We are of opinion, therefore, that all the children of Richard Simpson mentioned in the bill are entitled to share alike in the principal fund held by the complaint for them. With respect to the possible rights of after-born children, should there be any, to be let into the enjoyment of the fund through the continuing trust in the complainant, we express no opinion. It may never become, in the case before us, of any practical importance.

The surplus of income, we are of opinion, should be divided amongst the children as it would have gone, if it had been applied from year to year as directed. This disposition of it is governed by the apparent intention of the testator as gathered from the words of the will. The testator directs the *annual* application of the income to the use of (211) the children, and the principal fund (*simpliciter*) to be divided when the period for division arrived.

Let the income or proceeds remaining on hand go to those who would have received it had it been annually applied. And let one-fifth part of

the principal be allotted to the daughter, who is now of age. The costs should be paid out of the fund.

PER CURIAM. Decree accordingly.

Cited: Cooley v. Lee, 170 N. C., 21.

COLIN McDONALD v. DANIEL McDONALD.

Equity will give effect to the assignment of a mere expectancy or possibility, not as a grant, but as a contract, entitling the assignee to a specific performance as soon as the assignor has acquired the power to perform it.

Cause removed from the Court of Equity of CUMBERLAND.

Margaret McDonald, of Sampson County, died in the year 1855, without issue, leaving the plaintiff Colin McDonald her next of kin and heir at law. Letters of administration on her estate were granted to the defendant Daniel McDonald at.....Term, 1855, of Sampson County Court, and he took possession of her estate, consisting of 18 negroes and $404.90 in good notes. In 1816 the defendant, as administrator, filed an inventory, in which he omitted to include the slaves as property, for which he was bound to account, alleging that he had purchased them from Colin McDonald, the sole distributee of the estate, and had taken a deed therefor in the following words:

"Know all men by these presents, that I, Colin McDonald, of the county of Barbour and State of Alabama, for and in consideration of the sum of $1,000 to me in hand paid by Daniel McDonald, of the county of Cumberland and State of North Carolina, have bargained,
(212) sold, transferred and conveyed, and by these presents do bargain, sell, transfer and convey, all the right, title and interest, both legal and equitable, which I now have or may have at any time hereafter have in and to the property or estate which Margaret McDonald, late of Sampson, but now of Cumberland County, has—that is to say, all the interest which I have or may have as one of the heirs at law and next of kin of Margaret McDonald; and the right, title and interest which I have or may have in the property which she now has or which she may have at her death—that is to say, all my right, title and interest in the lands which she owns or may own; all my right in the negroes which she now owns or may hereafter have and own; all my interest in the bonds and notes that are now due and that may be due and owing to her; all my interest in the money which she may have, and the interest which I may have as an heir at law and as one of her next of kin in any other property which she may own, it being to convey every-

thing I may be entitled to to Daniel McDonald, of the county of Cumberland and State of North Carolina. And I, Colin McDonald, of the county of Barbour and State of Alabama, for and in consideration of the premises as above mentioned, do hereby relinquish and transfer my right, title and interest to him, the said Daniel McDonald, his heirs, executors, administrators, forever, free and discharged from any claim which I have or may have; free and discharged also from the claim or claims of any other person or persons whatsoever. And for the better securing the right, title and interest which I hereby convey, I, for myself, my heirs, executors and administrators, to and with the said Daniel McDonald, his heirs, executors, administrators and assigns, covenant and forever defend from the lawful claims of any and all persons whatsoever.

"In testimony whereof, I have hereunto set my hand and seal, this 8 October, 1849, in presence of William B. Wright.

"COLIN McDONALD. (SEAL)"

The nearest relations of the intestate Margaret at the time this deed was executed were the plaintiff Colin and his brother, Neil McDonald, who were her cousins. Neil McDonald, who was the (213) father of the defendant, died before the intestate Margaret.

The bill alleges that this deed was procured from the plaintiff by fraud and misrepresentation; that plaintiff is a weak-minded old man; that the defendant proposed to purchase his interest in the property in dispute, and informed him that in the event of Margaret McDonald's death he would be entitled to only one-third of her property; that this interest in one-third was all that the deed was intended to convey, and that it was so understood by both parties. This much the bill acknowledges to belong to the defendant under the deed, and it prays an account and conveyance of the other two-thirds.

The defendant in his answer denies having exercised any undue influence in procuring the deed above set out. He states that the plaintiff was then a resident of Alabama; that he came to this State in the year 1849, and applied to several persons, proposing to sell his interest in the estate of Margaret McDonald; that he at length applied to defendant and offered to take $1,000 for said interest; that plaintiff gave as his reasons for selling it that he lived at a distance; that he was growing old, and it was uncertain whether he would outlive Margaret McDonald, and also his brother Neil. He denies that the plaintiff is stupid, ignorant and illiterate, though getting old. He also denies that he and the plaintiff contracted with reference to any certain interest, but that he purchased at a venture; that the property, independent of debts, was worth $6,000 at the date of the deed, and that the price paid was a fair consideration under the circumstances; that the deed was prepared by

skillful counsel and read over to the plaintiff, and also explained to him, and he expressed his entire satisfaction with it, and that he had ample opportunity to inform himself of the condition of the estate before he executed this deed.

Fowle, Kelly, and William McL. McKay for plaintiff.
J. H. Bryan and K. P. Battle for defendant.

(214) BATTLE, J. The proofs satisfy us beyond a doubt that the instrument which the plaintiff seeks to impeach was obtained by the defendant fairly and without fraud or the exercise of any undue influence; that the plaintiff was at the time when he executed it entirely capable in law to do so; that he fully understood its import and meaning, and that the consideration which he received for it was, under the circumstances, fair, if not fully adequate. It cannot, therefore, be set aside either upon the ground of fraud, undue influence, want of capacity in the assignor, or for a defect of consideration. If, then, the plaintiff be entitled to the relief which he seeks, either in whole or in part, it must be because the instrument in question is inoperative, either because there was, at the time when it was executed, no interest in him upon which it could operate, or because it is illegal as being against the policy of the law; or if neither of these objections be good, that it does not convey or bind the whole of the plaintiff's interest in the estate of the defendant's intestate.

It is very clear that at the time when the instrument was executed it could not operate as a conveyance or assignment of what it purported to transfer. Margaret McDonald, the defendant's intestate, was then living, and the plaintiff had but a mere possibility or expectancy of an interest in her estate. He was at the time one of her nearest blood relations and had a chance, by outliving her, to become entitled to a part, or to the whole, of her estate as heir at law and next of kin, but he had no interest, or possibility coupled with an interest, in it. It follows as a matter of course that he did not have anything which he could assign or transfer to another, either at law or in equity; but he had a right to make a contract to convey whatever interest he might in future have in his cousin's property; and such a contract, when fairly made upon a valuable consideration, the Court of Chancery will enforce whenever the property shall come into his possession. Thus it is said—and the assertion is well sustained by the authorities both in England and in this country—that "Chancery will give effect to the assignment of a mere expectancy or possibility, not as a grant, but as a contract entitling the assignee to a specific performance as soon as the assignor has acquired the (215) power to perform it." See White & Tudor's Eq. Cas. (Amer. Ed.),

72 Law Lib., 202 and 224, which cites *Hobson v. Trevor,* 2 P. Will., 191; *Buckley v. Newland, ibid.,* 182; *Wright v. Faucett,* 1 Ves. Jun., 409; *Alston v. Bank,* 2 Hill, Ch. Cases, 235; *Breckinridge v. Churchhill,* 3 J. J. Marsh, 13; see, also, Smith Real and Personal Property, 89 Law Lib., 457, and Fry on the Specific Performance of Contracts, 100 Law Lib., 263, and the cases particularly of *Wiseman v. Roper,* 1 Ch., 154; *Alexander v. Duke of Wellington,* 2 Russ. & Myl., 35; *Persse v. Persse,* 7 Clark & Fin., 279; *Hinde v. Blake,* 3 Beav., 235, and *Meek v. Kettlewell,* 1 Phil., 347.

It is true that the policy of giving effect to contracts of this kind against expectant heirs has been doubted by very eminent judges, and C. J. Parsons, in *Boynton v. Hubbard,* 7 Mass., 112, refused to sanction an assignment made by a nephew in the lifetime of his uncle of his expectant interest in that uncle's estate. But the doctrine is now too well established to be disregarded, and the authorities to which they refer fully sustain White & Tudor in saying that "a mere expectancy, as that of an heir at law to the estate of his ancestor, or the interest which a person may take under the will of another then living, or the share to which such person may become entitled under an appointment or in personal estate as presumptive next of kin of a person then living, is assignable in equity for a valuable consideration; and where the expectancy has fallen into possession, the assignment will be enforced.

Having decided that the instrument in question is binding upon the plaintiff, it only remains for us to inquire what is the extent of the interest upon which it operates. It is contended by the plaintiff's counsel that, at most, it can bind only the apparent expectant interest which the plaintiff had in his cousin's estate at the time it was executed, which, as his brother Neil was then alive, was only one-half. The language of the instrument is as broad and extensive as it could well have been made, and embraces everything which in any possible contingency could accrue to the grantor from the estate to which it relates. It is (216) quite probable that neither party fully considered what might eventually come within its operations, but they agree to take the chances, and they must now abide by the result. Had the plaintiff died before his brother in the lifetime of the intestate, or had they both died before her, then the defendant would have taken nothing by his contract. Had both brothers outlived their cousin, the defendant could have claimed under the assignment only one-half of the estate, but as the events occurred, which were most favorable to him, he gets all.

The result is that the plaintiff has no equity in the claim which he prefers. If he had in any way obtained the possession of the property of the intestate, the court of equity would have compelled him to convey it to the defendant, and it follows as a necessary consequence that as it

is already in the hands of the latter, the Court will not aid the plaintiff in getting it from him.

PER CURIAM. Bill dismissed with costs.

Cited: Mastin v. Marlow, 65 N. C., 703; *Tucker v. Markland,* 101 N. C., 427; *Watson v. Smith,* 110 N. C., 9; *Foster v. Hackett,* 112 N. C., 556; *Wright v. Brown,* 116 N. C., 28; *Taylor v. Smith, id.,* 534; *Brown v. Dail,* 117 N. C., 43; *Boles v. Caudle,* 126 N. C., 355; *Vick v. Vick, id.,* 126; *S. c.,* 133 N. C., 534; *Kornegay v. Miller,* 137 N. C., 665, 669.

ALEXANDER LITTLE, EXECUTOR, v. JOHN G. MCLENDON ET ALS.

An estate in slaves, limited by will to the sole and separate use of a *feme covert* without any express limitation over to another, devolves, after her death, upon her husband, *jure mariti.*

CAUSE removed from the Court of Equity of ANSON.

Christopher McRae made his will, and died in 1837, leaving the plaintiff Alexander Little his executor, who qualified. Among many other bequests, the testator gave certain slaves to his daughter Margaret, wife of Allen Teal, and others to his daughter Isabelle, wife of William Teal.

Both these daughters died subsequently to the testator, leaving (217) their husbands and several children, each surviving, and administration was taken upon their estates. The bill is filed by the executor of Christopher McRae, praying to be instructed as to the manner of paying the legacies under the will, and particularly to whom he shall pay over the shares of Margaret and Isabella. He sets forth certain clauses of the will, from which it appears to the executor doubtful whether the shares of the two daughters are given to their sole and separate use, and, if so, he asks to be informed upon whom their interests devolve—whether upon their administrators, or their children, or upon their husbands. All these are made parties to the bill, and they insist on the construction favoring their several interests. As, in the view taken of the case by this Court, the question whether the wives took separate estates is not material to the solution of the main question presented, it is deemed unnecessary to recite the terms of the will, out of which it is supposed to arise, further than to state that there is no ulterior disposition of the shares of Margaret and Isabella after their deaths.

Winston, Sr., for plaintiff.
Ashe for defendants.

BATTLE, J. The only questions which the counsel for the plaintiff, in his argument before us, has presented for our consideration, and upon which he has asked for a decision, are, whether under the fifth clause of the will of the testator Christopher McRae the *femes covert* therein named took estates to their sole and separate use; and if they did, whether, upon their deaths, the slaves therein given belonged to their surviving husbands, to their administrators, or to their children. The counsel contends, first, that the wives took separate estates in the slaves; and, secondly, that upon their deaths they went to their children.

We deem it entirely unnecessary to decide the first question, for supposing that the wives did take estate in the slaves to their sole and separate use, yet upon their deaths the slaves passed immediately to their husbands. This is so clearly established by the authorities (218) that no argument is required in favor of it. See McQueen on Husband and Wife, 66; Law Lib., 82; also, Smith on Real and Personal Property, 89; Law Lib., 578, and the cases therein cited and relied upon. The reason of the rule is that the separate estate of the wife is protected from her husband and from his assignees and creditors for her benefit during the coverture only, and that upon her death such protection being no longer necessary, the property devolves upon the husband immediately, *jure mariti,* unless it be expressly limited over to her children or to some other person. If, indeed, the separate property consists of choses in action, then upon the death of the wife the husband, or some person for him, will be obliged to take out letters of administration upon her estate in order to reduce them into possession. In the present case, it will be declared that the slaves given to the plaintiff under the fifth clause of the will of the testator, in trust for the *femes covert* legatees therein named, now belong to the husbands respectively of those who have died, whether they were given to the sole and separate use of the said *femes covert* or not. We suppose that an account of the estate of the testator must be stated, and we presume the above declaration will enable the parties to settle without further difficulty.

PER CURIAM. Decree accordingly.

Cited: Rouse v. Lee, 59 N. C., 354; *Carson v. Carson,* 60 N. C., 579.

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GEORGE H. FARIBAULT v. N. A. TAYLOR ET ALS.

1. Where a testator gave slaves to a trustee, in trust for his daughter and her children, "free and exclusive of any control of her husband," she having children at the time, it was *Held* to manifest an intention to provide specially for the daughter, and that she consequently took an estate for life in the negroes, with a remainder to her children born or that might be born thereafter.

2. Where a testator had placed in the hands of a married daughter a female slave, who had two children afterwards, and before the death of the testator, and the donor, by his will, expressly confirms the *gift of the negroes already received*, and another clause in the same will required the whole estate, real and personal, to be divided after the manner of law and equity, it was *Held* to be the intention of the testator that the property should be valued as of the time of the original gift and the two children excluded from the valuation.

3. Where a will contained the following clause, "upon consultation, if Georgiana wishes to remain with her mother, provided it be possible, this house ought to be enlarged for her comfort, which I recommend, so as to make room for boarders," it was *Held* that such clause was too vague to be carried into effect.

CAUSE removed from the Court of Equity of WAKE.

The bill was filed by the administrator, with the will annexed of Dr. A. H. Taylor, for directions and advice as to his duty in carrying out the intentions of the testator in the several particulars stated in the pleadings. The clauses in the said will, and the facts applicable to the questions raised thereon, are so fully stated in the opinion of the Court that it is deemed unnecessary to repeat them here.

Miller and Busbee for plaintiff.
No counsel for defendants.

BATTLE, J. The bill is filed by the plaintiff as the administrator, with the will annexed, of Dr. Alexander H. Taylor for the purpose of getting the advice and direction of the Court as to the proper construction of certain clauses in the will of the testator.

1. The difficulty is presented in the clause which gives the share of his estate to which the testator's oldest daughter, Mrs. Spivey,
(220) may be entitled to certain trustees, in trust "for the benefit of her and her children, free and exclusive from any control of her present or any other husband she may have." At the time of the testator's death Mrs. Spivey had three children, and the question is, whether she takes an absolute estate as tenant in common with those children, or an estate for life only, with the remainder to the children which she

now has or may hereafter have. The construction which would give the property to her and her present children only as tenants in common of the absolute interest in it is inadmissible, both because it might, by diminishing the present and immediate interest in the wife, be an inadequate support for her during her life, and because it would exclude from the benefit of the fund any children she may hereafter have. The manifest intent of the testator will be much more effectually carried out by giving to the wife a life estate, with a remainder to all the children which she now has or may hereafter have; and as the property is bequeathed to trustees, in trust for the benefit of her and her children, this construction is fully supported by the recent cases of *Bridgers v. Wilkins,* 56 N. C., 342; *Chestnut v. Mears, ibid.,* 416; *Coakley v. Daniel,* 57 N. C., 89. Had the bequest been a direct one to Mrs. Spivey and her children, then, under the authority of *Moore v. Leach,* 50 N. C., 88, we should have been constrained to hold that the wife and children living at the death of the testator took an absolute interest in the fund as tenants in common. The principle upon which the distinction is founded is stated and explained in the cases referred to and need not be repeated. The share of the testator's property given to Mrs. Spivey is for her sole and separate use, and the trustees may permit her to have the possession of it, provided the profits of it can be thereby secured to her.

2. The second difficulty suggested in the bill arises from the following sentence in the will: "The negroes already received by Mr. Faribault I wish counted in according to value, so that all share and share alike, and the mode of division I leave to the parties concerned, (221) desiring only that equality and justice may be their guide." The testator had, in the first clause of his will, directed that his "whole estate, personal and real, should be divided after the manner of law and equity" amongst the heirs of his body. He had in his lifetime given to Mr. Faribault, by parol, several slaves, among whom was a woman who had two children after she was put into his possession, and the question is, whether the slaves thus given are to be valued as of the time of the gift, exclusive of the children born since, or are the whole of them, including these children, to be valued as of the time of the division. There is no doubt that the effect of the will was to confirm the parol gifts and make them good *ab initio,* so that the issue of the female slave born afterwards and before the death of the testator belonged to the donee. *Bullock v. Bullock,* 17 N. C., 314; *Woods v. Woods,* 55 N. C., 420. Such being the case, and the will containing a direction that the division between the children shall be "after the manner of law and equity," we think the valuation of the slaves given to Mr. Faribault should be of the time of the gift, and thus exclude from it the children born after-

wards. *Ward v. Riddick,* 57 N. C., 22, is an authority for this construction and explains the reason upon which it is founded.

The last question upon which the administrator *cum testamento annexo* seeks the advice of the Court arises from the following clause of the will: "Upon consultation, if Georgiana wishes to remain with her mother, provided it be possible, this house ought to be enlarged for her comfort, which I recommend, so as to make room for boarders also." Georgiana is one of the daughters of the testator, and the administrator wishes to know what is his duty in relation to the enlargement of the house; and if it is to be enlarged, at whose expense? The first remark which the clause suggests is that it seems to be more a recommendation than an imperative direction. If, however, it be taken to be the latter, we feel ourselves bound to hold it to be void for uncertainty. (222) When is Georgiana to decide whether she wishes to remain with her mother? How long is she to remain with her? How much larger is the house to be made for her comfort? How many boarders are to be provided for? What is to be the cost of the improvements, and who is to decide these questions? All these are matters of so much uncertainty that we do not feel ourselves able to give them a practical effect. The doctrine of endeavoring to effectuate the intention of a testator *cy pres* has been long since exploded in this State. That doctrine applies to a case where, from some cause or other, the intention of the testator, though expressed in terms sufficiently explicit, cannot be carried out in accordance with his wishes. If, then, the Court will not attempt to direct the accomplishment of something approximating his declared wish, *a fortiori,* it ought not to attempt to accomplish a purpose expressed in such vague and uncertain terms that no person can hazard more than a mere conjecture as to what it is. See *White v. University,* 39 N. C., 19; *Bridgers v. Pleasants, ibid.,* 26; *McAulay v. Wilson,* 16 N. C., 270; *Holland v. Peck,* 37 N. C., 255; *Hester v. Hester, ibid.,* 330.

PER CURIAM. Decree accordingly.

Cited: Ballantyne v. Turner, 59 N. C., 229; *Hooker v. Montague,* 123 N. C., 158.

(223)

BARTHOLOMEW FULLER ET ALS V. WILLIE FULLER ET ALS.

1. A bequest to one *when* he arrives at age or marries would ordinarily not vest unless the condition be performed by the arrival at age or marrying, but the rule is otherwise when special circumstances appear from other parts of the will which show it to have been the testator's intention only to postpone the enjoyment, and not to make the ownership contingent.

2. Where an estate was given to an infant daughter *when* she arrived at 21 or married, and in the same will vested estates were given to the other children, and the will provided that the legatee should live with her mother until her arrival at full age or marriage, and that the mother during this time should have the use of the property bequeathed for the support of the legatee and another child, and by holding the bequest contingent, by another part of the will, part of the same property would return to and become vested in the personal representative of the same legatee, and a disturbance of other vested legacies would take place, it was *Held* that these circumstances showed it to be the intention of the testator that the legacy should be *vested* in interest, though the enjoyment was postponed.

CAUSE removed from the Court of Equity of FRANKLIN.

The bill was filed by the legatees, under the will of Bartholomew Fuller, against the executor for the recovery of their legacies. The only matter of controversy or doubt arises as to the share of the estate bequeathed to Mary Fuller. The portions of the will bearing on the question are the following:

"I lend to my wife, Sarah Fuller, during her life or widowhood, the land and plantation whereon I now live and three negroes, Lewis, Frankey, and Tempey, together with as much of my crop, stock, household and kitchen furniture as may be necessary for her support and the support of my children that live with her until they marry or arrive at lawful age."

Item second gives to a daughter, Nancy Winston, and her children two slaves and other property heretofore advanced to her. Item 3 gives to Willie J. Fuller two slaves and the property formerly advanced to him. Item 4 gives to Thomas Fuller three slaves. Item 5 gives to Sarah Moore and her children a negro woman and four children. Item 6 to Bartholomew Fuller three slaves. Item 7 to Jones Fuller one slave and the land given to his mother after the expiration of her (224) life estate. Item 8 gives to Eliza Fuller one slave and a tract of land.

Item 9. "I give to my daughter Martha Fuller, when she marries or arrives at lawful age, three negroes, to wit, Fanny, Dolly, and Jeremiah, one horse, bridle and saddle, one feather bed and furniture, two cows and calves, and two sows and pigs."

Item 10. "I give to my daughter Mary Fuller, when she arrives at lawful age or marries, three negroes, to wit, Prissy, Fenner, and Asbury, one horse, bridle and saddle, one feather bed and furniture, two cows and calves, and two sows and pigs."

Item 11. "It is my will and desire that my wife, Sarah Fuller, should have, use, and enjoy, all and single, the balance of my estate not hereinbefore given away during her natural life, and at her death that the slaves hereinbefore loaned to her, and their increase, together with what-

ever may be remaining of the balance of my estate, be equally divided between seven of my children, namely, Willie, Bartholomew, Thomas, Jones, Elijah, Martha, and Mary."

Mary, the legatee last mentioned, died without having married and without having arrived at the age of 21, and the plaintiff Thomas Howerton administered on her estate.

The question raised by the pleadings is, whether the slaves and other property given to the daughter Mary vested in her so as to go to her administrator, or otherwise.

B. F. Moore and Winston, Sr., for plaintiff.
No counsel for defendant.

PEARSON, C. J. A bequest to A., "if" or "provided" or "when" he arrives at age or marries, standing alone, does not vest unless the condition is performed, and will not devolve upon his personal representatives should he die before arriving at age or marriage. The words "if" and "provided" import an absolute condition, but "when" is not
(225) so stubborn, and will yield to an intention if it can be reasonably inferred from other parts of the will not to annex the condition to the *gift,* but only to the *possession* and *enjoyment;* as when the suspension of the enjoyment may be accounted for by special circumstances and reasons not applicable to a suspension of the gift, showing that the *only* purpose was to suspend the enjoyment, and that the word "when," if not thus restricted, would carry the suspension beyond what the testator meant.

This principle of construction has been acted on in many cases. *Perry v. Rhodes,* 6 N. C., 141. A bequest of all the testator's personal property to be divided among his wife and daughters *when* the youngest daughter attained the age of 21, but in the meantime he gives all his personal property to his wife, except the negroes, which he directs his executors to hire out and pay the hire to his wife yearly: *Held,* that the legacy was vested, and that the share of a daughter who died before the youngest arrived at age devolved upon the administrator, for the intention to postpone applies only to the time of enjoyment, and the right vested immediately. "The intermediate interest is given to the wife, doubtless with a view to the benefit of the children as well as herself, and it has been held that when the intermediate interest is given, either to a stranger or to the legatee himself, such case forms an exception, because it explains the reason why the time of payment or division was postponed, and is perfectly consistent with an intention in the testator that the legacy should immediately vest."

This exception is stated by Smith in his very learned "Original View of Executory Interests," and many cases are cited to illustrate and support it. At page 157, "When the testator gives the whole of the intermediate income of real estate, or of personal estate, to the person to whom he devises or bequeaths such estate *on* the attainment of a certain age, but the attainment of that age does not form a part of the original description of the devisee or legatee, the interest is vested in right before that age, even though there is no prior distinct gift—no express gift, except at that age—it being considered that the testator (226) merely intended to keep the devisee or legatee out of the possession or enjoyment until he should have become better qualified to manage, or more likely, to take due care of the property." Among other cases, he cites *Hanson v. Graham,* 6 Ves., 239: "A testator gave his three grandchildren £500 stock apiece when they should respectively attain their ages of 21 or marry, and he directed that the interest should be laid out for the benefit of his grandchildren until 21 or marriage. One of them died at the age of 9. Sir William Grant, M. R., held that she took an entire interest, for, from the circumstances and expressions, it might be collected that the word 'when' was used, not as a condition, but merely to postpone the enjoyment, the possession in the meantime being disposed of another way; and it was evident that only the payment was postponed for a particular purpose, namely, in order that the legatee might not have the possession and management until she had use for it by marriage or arrival at full age." At page 164: "Where there is, in terms, no devise or bequest except on the attainment of a certain age, and the postponement seems merely to arise from the circumstances of the estate, or appears to be for the accomplishment of some special purpose, unconnected with the property or ownership, as for the purpose of paying debts out of the intermediate income, or for the benefit or convenience of some other person to whom the income, or a particular interest, is given in the meantime; in such case it is held that there is a suspension of the possession or enjoyment only, and not of the property or ownership, and the interest is vested." He cites, among many other cases, *Mansfield v. Dugard,* 1 Eq. Cas. Ab., 195; *Goodright v. Parker,* 1 Mauls & Sel., 692. A testator devised lease-hold houses to J. T. S. for his own use and benefit *on his attaining 21,* and in the meantime to trustees to receive the rents, pay certain charges, and pay for the maintenance of J. T. S. during his minority; J. T. S. died before (227) 21: *Held,* that the took a vested interest.

The exception is settled; it remains to make the application to this case. In our opinion, the will presents not only one, but many circumstances which bring the legacy to Mary within the exception, by showing clearly that it was the intention of the testator merely to postpone

her possession and enjoyment until she married or arrived at age, and would need and be capable of managing the slaves and other property, and not to postpone the ownership or right of property.

1. Some of his children were of age. To these he gives vested legacies. Martha and Mary were infants. He intended them to live with their mother, to whom he gives the home place and other property "necessary for her support and the support of these two children until they marry or arrive at lawful age." This accounts for his intention to postpone the possession and enjoyment of the property which he intended for them; but to carry the postponement further and make it apply to the ownership, so as to prevent the legacies from being vested, would be a discrimination to their prejudice and contradict the whole scope of the will.

2. "The use and enjoyment of all and singular the balance of the estate not hereinbefore given away" is given to the wife for life. This includes the particular interest in the slaves set apart for Martha and Mary created by the postponement of their possession and enjoyment until full age or marriage, showing that one purpose for making the suspension was to give his wife the benefit of the services or hires of the slaves during the time she was charged with the support of the two daughters. This has no bearing on the suspension of the ownership, and brings the case directly within the exception stated above, by showing that it was no part of his purpose not to allow the legacies to be vested like the others.

3. At the death of the wife, the residue is given to some of the children, including Martha and Mary. This is vested. Why should he give a vested interest in the residuary clause if he had not intended them to have a vested interest in the property which is specifically set
(228) apart for them? See to what it leads: As Mary died under age, if the specific legacy to her is not vested, the slaves set apart for her either fall into the residuum, and her administrator becomes entitled to a seventh part thereof, or are undisposed of, and her administrator becomes entitled to a ninth part, representing her as one of the next of kin, and so her personal representative takes a part of the property which the testator did not intend that she should have unless she arrived at age or married. *Reductio in absurdum.*

4. At the death of the wife, the residue is given to some of the children, including Martha and Mary. Suppose the wife had died before either arrived at age or married, then, if their legacies are not vested so as to give them the ownership of the slaves set apart for them, the slaves would fall into the residuum and be divided off among the seven residuary legatees, or else would be considered as undisposed of and be divided off among the nine children as next of kin. Martha marries and arrives

at age; the division must be upset so as to let her take back the slaves Fanny, Dilly, Jeremiah, and their increase, to whom she has now become entitled by performing the condition; and provision must also be made by an abatement of what had been distributed under the residuary clause to provide for her "one horse, saddle and bridle, two cows and calves, and two sows and pigs." Then supposing that Mary had arrived at age or married, the whole matter must be again upset in order to give her the "slaves Prissy, Fenner, Asbury, and their increase, and the horse, etc., and sows and pigs." So that the construction by which the legacy to Mary is considered vested is necessary to carry out the intention of the testator, and the Court is driven to it, in this case, in order to avoid palpable absurdities.

The decree will declare the opinion of the Court to be that Mary took a vested interest in the legacy given to her, which devolved upon her administrator.

PER CURIAM. Decree accordingly.

Cited: Burton v. Conigland, 82 N. C., 103; *Hooker v. Bryan,* 140 N. C., 405.

(229)

JAMES HARRELL, FOR HIMSELF AND AS ADMINISTRATOR, v. BENJAMIN HARRELL, EXECUTOR, ET ALS.

1. The act of 1823, Rev. Code, chap. 37, sec. 21, enabling a remainder in slaves, after a life estate, to pass by deed, has no effect upon a deed executed prior to its enactment.

2. A deed of bargain and sale to one for life, *in trust for his own use*, conveys simply an estate to him for life, which, before the act of 1823, amounted to the whole interest, and a limitation over after such a provision passed nothing.

THIS was a bill for the partition of slaves, transmitted from the Court of Equity of MARTIN.

James Moore, by deed dated 18 November, 1823, conveyed "unto his daughter Mary Harrell, in trust during her natural life, the two following negroes, Peter and Rosetta, with their increase, for her own use and behoof, and after her death the said property to be equally divided between her four children, James, Mary, Joshua, and Rosannah Harrell, to them and their heirs forever."

Shortly after the execution of this deed the said slaves went into the possession of Joshua Harrell, the husband of the legatee, Mary, and with the increase of Rosetta (now amounting to ten), so remained until his death in 1856. Mary, the wife of the said Joshua, died in 1853.

Joshua, the husband, made his will, and bequeathed most of the slaves

in question to others than the persons designated in the above recited deed, and the executor therein named has possession of them, claiming them for the estate of his testator solely and exclusively. The bill is filed by James Harrell, one of the children named in the deed, for himself and as administrator of his deceased brother, Joshua Harrell, Jr., against the executor of Joshua Harrell, Sr., and the rest of the children, insisting, that by proper construction of the said deed, the slaves therein mentioned were vested in Joshua Harrell, Sr., the husband of Mary Harrell, absolutely, in trust during the life of his said wife for his benefit, and after her death in trust for her four children, James, Mary, Joshua, Jr., and Rosannah, absolutely, and the prayer is for a division accordingly.

(230) The answers of the defendants disclosed nothing differing from the above statement, but insisted that Joshua, the husband of Mary, took the absolute interest in these slaves *jure mariti*.

Rodman for plaintiffs.
Winston, Jr., for defendants.

MANLY, J. Prior to the act of 1823, no remainder could be limited by deed at common law upon a life estate in a slave. A conveyance for life was a conveyance of the whole. The deed before us for construction was executed before the passage of that act, and consequently was not affected by it. The rights vested by the operation of the deed could not be divested by the passage of the act.

It is a familiar principle of conveyancing that a deed of bargain and a sale to one for life, in trust for his own use, is simply an estate for life. The deed in question is no more. The bargainor conveys to his daughter, "Mary Harrell, in trust during her natural life, the following slaves, Peter and Rosetta, with their increase, for her own use and behoof." This is a conveyance to her of a simple life estate in the slaves; and as it was prior to the act of 1823, it was, as we have already shown, a conveyance of the whole.

Thus the husband, Joshua Harrell, Sr., became vested *jure mariti* with an unrestricted estate in the slaves, and they and their increase are rightfully in the hands of his personal representatives, subject to be disposed of according to law and the will of their testator.

It is not supposed that it was impracticable prior to the enabling statute referred to, by deed, to limit a remainder after a life estate in chattels, provided it were done by proper words for separating and keeping apart the legal and equitable estates. That is not done in our case. The trustee and the *cestui que trust* being identical, there is no estate of any sort outside of the latter, and the results follow as declared above.

PER CURIAM. Bill dismissed with costs.

(231)

JOHN A. PLESS v. JAMES A. COBLE ET ALS.

Where a testator, in a residuary clause, gave the surplus of his property to a son and daughter, in these words, "and my desire is that such surplus be equally divided and paid over to my son A. and my daughter M.; my will and desire is that my daughter M.'s equal part, in this last devise, to her bodily heirs, equally to be divided between them," it was *Held* that the daughter took an estate for life, with remainder to her children.

CAUSE removed from the Court of Equity of STANLY.

Peter Pless died in the county of Stanly in 1858, leaving a last will and testament, which was admitted to probate at May Term, 1858, of Stanly County Court, and the plaintiff John A. Pless qualified as executor of the same. This will, after various specific devises and bequests, contains a residuary clause in these words: "My will and desire is that all the residue of my estate, if any, after taking out the devisees and legacies above mentioned, shall be sold and the debts owing to me collected, and if there should be any surplus over and above the payment of debts, expenses and legacies, that such surplus shall be equally divided and paid over to my son Adam and my daughter Malinda. My will and desire is that my daughter Malinda's equal part in this last devise to her bodily heirs equally divided between them, and said legacies to be paid over to the above mentioned within two years from my decease to them, and each and every one of them, their executors, administrators and assigns, absolutely, forever."

Malinda, the daughter mentioned in this will, is now the wife of the defendant Coble, and the bill is filed by the executor for a construction of this residuary clause.

Busbee for plaintiff.
Jones for defendant.

BATTLE, J. The residuary clause of the will, as to the construction of which we are called upon to give an opinion is expressed in such vague and indistinct terms that it is difficult to ascertain the purpose which the testator had in view. The fund is directed to be divided equally between his son Adam and his daughter Malinda; and (232) then he says, "my will and desire is that my daughter Malinda's equal part in this last devise to her bodily heirs equally to be divided between them," etc. Does the testator mean by this that his daughter's half of the surplus shall not be enjoyed by her at all, but shall be equally divided between her bodily heirs, or does he intend that she shall have it for life, with remainder to them? And if so, will the rule in *Shelley's case* apply so as to give her the absolute interest? The language is un-

doubtedly obscure, but we cannot believe that the testator intended to deprive his daughter of what he calls her "equal part"; if so, why did he direct an equal division between her and his son Adam, and call one share her part? If he intended it for her "bodily heirs" he would have been more likely to have said that the fund should be divided into two equal parts, of which his son Adam should have one and his daughter Malinda's bodily heirs or children should have the other. Such language would have been clear and explicit and would have left no doubt of the testator's meaning to exclude his daughter in favor of her children.

Our opinion, then, is that the daughter was intended to take, and does take, one-half of the surplus mentioned in the residuary clause of the testator's will. The question then arises, whether she takes it absolutely, under the operation of the rule in *Shelley's case,* or only for life, with remainder to her children; and upon that question, the latter is, we think, the proper one. The provision that the fund is to go to the daughter's "bodily heirs, *equally to be divided between them.*" prevents the application of the rule in *Shelley's case,* as is now well settled by authority. See *Swain v. Rascoe,* 25 N. C., 200, in which the previous case of *Bradley v. Jones,* 37 N. C., 245, is referred to and overruled. See, also, *Jacobs v. Amyatt,* 4 Bro. Ch. Cas., 542, and 2 Rop. on Leg., 354-355.

A decree may be drawn, in which it will be declared that the defendant James A. Coble and his wife Malinda will be entitled to one-
(233) half of the surplus of the money mentioned in the residuary clause of the testator's will during the life of the said Malinda, and after her death the same must be equally divided between all the children which she now has or may hereafter have.

PER CURIAM. Decree accordingly.

Cited: Pless v. Coble, 123 N. C., 158.

MARY E. SHEARIN v. SEBASTIAN C. SHEARIN.

It is not competent for the Superior Court, on a petition for divorce and alimony, on the question of allowing alimony *pendente lite,* for the defendant to read his answer, much less affidavits in support of it.* It is otherwise upon the question of the *amount* of the allowance, for in that not only the answer, but affidavits also can be read.

MOTION for alimony *pendente lite,* heard before *Shepherd, J.,* at Fall Term, 1859, of the Court of Equity of HALIFAX.

*Changed by statute, Rev., 1566.—ANNOTATOR.

Mary C. Shearin had filed her petition to be divorced from her husband, S. C. Shearin, who was a minor. Upon the coming in of the defendant's answer, the plaintiff moved the court to allow her alimony pending the suit. The motion was resisted by the defendant, who offered to read an affidavit of one Crawley, which was in affirmance of the answer and in opposition to the allegations in the petition showing the causes for divorce. This was proposed on the question of allowing the alimony.

The court rejected the evidence offered, and allowed alimony of two-thirds of the income of the husband's estate, to continue until the further order of the court, the defendant being a minor and his estate being in the hands of his guardian. From this order the defendant appealed.

On the argument here, it was contended that the affidavit was competent as influencing the judge's discretion on the question of the amount of alimony.

Conigland and Batchelor for plaintiff. (234)
B. F. Moore for defendant.

BATTLE, J. The question presented on this appeal is, whether it was competent for the Superior Court, on a petition for a divorce and alimony, to hear an affidavit in support of the answer for the purpose of inducing the court not to allow the petitioner alimony *pendente lite*. This question arises on sec. 15, chap. 39, Revised Code, which is in the following words: "In petitions for divorce and alimony, or for alimony, where the matter set forth in such petition shall be sufficient to entitle the petitioner to a decree for alimony, the court may, in its discretion, at any time pending the suit, decree such reasonable alimony for the support and sustenance of the petitioner and her family as shall seem just under all the circumstances of the case. And from such interlocutory decree there may be an appeal to the Supreme Court, but the Court shall reëxamine only the sufficiency of the petition to entitle the petitioner to relief." In the court below, the sufficiency of the matters set forth in the petition to entitle the petitioner to relief was deemed to be the only question which the court had to consider in deciding whether there should be an allowance made to her for the support of herself and her family during the pendency of the suit. We concur in that opinion. The court had no right, under the provision in section 15 of the act referred to, to look into the answer of the defendant or into any affidavit in support of the answer for the purpose of seeing whether her claim was well founded, and of course to refuse her any immediate allowance of alimony if it were deemed ill-founded. The whole object of the act would be defeated in many cases if the practice contended for

by the defendant were sanctioned, as is clearly shown by the reasoning of this Court in *Taylor v. Taylor,* 46 N. C., 528. The clause of the act which gives an appeal to this Court from an interlocutory order of the Superior Court allowing alimony *pendente lite* confines this Court to the reëxamination of the sufficiency of the petition to entitle the (235) petitioner to relief, and we think it is a conclusive inference from this that the Superior Court was confined to the same narrow bounds in deciding whether there ought to be an immediate allowance at all or not.

The other question presented in the argument of the defendant's counsel, as to the amount of the allowance, admits, as we think, of a different solution. As to that, we can perceive no sufficient reason why the judge may not read the defendant's answer as well as hear affidavits for the purpose of ascertaining the true value of the defendant's estate, and thus be able to settle the amount of alimony which, without injustice to him, the petitioner ought to receive pending the suit. We so held in *Everton v. Everton,* 50 N. C., 202, and we are still of the same opinion. The argument of the defendant's counsel that the allowance *pendente lite,* which is, of course, made upon a mere *prima facie* case, was never intended by the statute to be greater than that given by the third section of the act upon a case fully and conclusively proved is very forcible, and will no doubt have its due effect upon the judge who may preside at the next term of the court of equity for Halifax County when the report of the clerk and master ordered at the last term of that court shall have been made.

The interlocutory order from which the appeal was taken is

PER CURIAM. Affirmed.

Cited: Simmons v. Simmons, 62 N. C., 65.

(236)

FRANKLIN B. HARRISON AND EMILY, HIS WIFE, AND WILLIAM FOY, ADMINISTRATOR OF BENJAMIN F. SIMMONS, *v.* MARIA L. WARD, AND WILLIAM E. WARD.

1. Where a testator, by her will, gave land and slaves to his daughter, M. S., and if she died without children surviving her, "then the lands to my own heirs at law, and the slaves and their increase to my next of kin," and gave lands and slaves to a son, and provided that if he should marry, the said lands and slaves should be held by his son and his wife and the children that might survive their parents, *upon the same terms* and subject to the same uses, conditions, and limitations mentioned in the devise to his daughter, M. S., it was *Held* that upon the death of the son, without leaving a child, the lands devolved upon his testator's heirs at law, who were a daughter and two children of a deceased daughter, but that the slaves went to the daughter alone.

2. A limitation to the *next of kin* in a will, without other explanatory words, was *held* to mean the *nearest of kin*.

CAUSE removed from the Court of Equity of JONES.

The questions presented in this suit arise on the construction of the will of Lemuel H. Simmons. The clauses of the will material to the consideration of the points submitted to the court are as follows:

Fourth. "I give to my daughter Mary Ann Simmons all my right, interest, and share in the Buckner Hatch Mills held in common with John Oliver, two beds and furniture, and an equal share with my children of my slaves, and a share of my perishable estate after my debts are paid; and on the marriage of my said daughter Mary Ann Simmons said property mentioned in this clause of my will to be held by my said daughter and her husband during their joint lives and the life of the survivor, and at the decease of the said Mary Ann and her said husband to be equally divided between the children of my said daughter who may survive their said parents and be living at their death; but should my daughter and her husband die and leave no child or children of the said Mary Ann living at the death of the said Mary Ann and her husband, then I give the said lands to my heirs at law and the said slaves and their increase to my next of kin."

Sixth. "Item: I give and devise to my son Benjamin Franklin Simmons all my lands not already given away and devised in this will; also an equal share of my slaves with my other children, (237) and a share of perishable estate after my debts are paid; and should my said son marry, the said lands and other property to be held by my said son Benjamin and his wife and the child or children of the said Benjamin surviving their parents, upon the same terms and subject to the same uses, conditions and limitations mentioned in the devise to his sister, Mary Ann Simmons."

Mary Ann Simmons married one Richard Oldfield, and died in the lifetime of the testator, leaving no children, but leaving her husband surviving her. (As to the disposition of her share, see *Simmons v. Gooding,* 40 N. C., 382.)

The defendants Maria and William E. are the children of a daughter Elizabeth, who died in the lifetime of the testator, and are expressly provided for in another clause of the testator's will. They are minors and represented in this Court by their father, who is their guardian.

Benjamin F. Simmons survived his father, and having held the land and slaves given to him until the year ....., he died intestate, without having married and without child or children.

The plaintiff Emily is the daughter of and only surviving child of the testator Lemuel H. Simmons. She intermarried with the plaintiff F. B.

Harrison, and they two, with William Foy, who administered on the estate of Benjamin F. Simmons, bring this suit, praying the Court to declare their rights under the will in order that the share and interest of Harrison and wife may be paid to them under a decree of the Court and the administrator may be protected in his disposition of the personal estate in his hands.

It is contended on the part of Harrison and wife that on the death of B. F. Simmons without leaving a wife or child, the land devised to him under the limitation in L. H. Simmons' will goes one-half to Mrs. Harrison and the other half to the defendants Maria L. and William E. Ward jointly as the heirs at law of the testator, and that the slaves go to them (Harrison and wife) under the limitation in the said (238) will *to the next of kin,* which they contend means *nearest in degree to the testator.*

The answer of the defendants was filed, not contesting any of the facts as above stated, but contending that they are entitled to a share of the slaves as well as of the land.

Badger, Haughton, Green, and J. W. Bryan for plaintiffs.
McRae for defendants.

MANLY, J. It is quite clear to our minds that it was intended in this will to limit over the estate given to Benjamin F. Simmons in the same way *mutatis mutandis* as that given to the daughter Mary Ann.

The testator bequeaths in the fourth paragraph property, real and personal, to his said daughter; and on *her marriage,* to herself and husband jointly and to the survivor, and after the decease of both, to the children of the marriage which may be then living; and if there be no children left, the *land* is given to *the heirs at law* and the slaves to the next of kin. In the sixth paragraph he proceeds to give in the same terms real and personal estate to Benjamin F. Simmons, and provides: "*should my said son marry,* the lands and other property to be held by my said son and wife and child or children surviving upon the same limitations mentioned in the bequest to his sister Mary Ann." It is obvious, upon a consideration of the latter clause, the testator intended to trammel the property given with similar conditions and limitations to those set out at length in the bequest to his daughter, for although different words were used in speaking of the first contingency, upon which there is to be a change in the holding, the phrases used seem to be equivalents in meaning, and the purpose seems to be clear to put the two upon the same footing in all respects.

When the will was in this Court before for construction (*Simmons v. Gooding,* 40 N. C., 382) it was settled with respect to property given

to Mary Ann Simmons (she having married and died without (239) children in the lifetime of the testator), that although the legacy to her lapsed and her husband, who survived, took nothing, yet the bequest over of the land to the testator's heirs at law and the slaves to his next of kin stood "and the heirs at law and next of kin of the testator took by purchase as devisees and legatees." This decision is based upon the assumption that the vesting of the particular estate was not necessary to support the ulterior executory bequests. We think the principle assumed is clear. It seems to be also equally clear that the bequest over was not dependent upon the happening of any intermediate contingencies—for instance, the marriage of the daughter, for if she had survived her father unmarried, she would have taken immediately an estate for life, subject to be enlarged so as to take in a husband upon marriage, remainder over to children, if any, and if none, then the land to the heirs at law and the slaves to the next of kin. The rule of construction in such cases is that a limitation over is never dependent upon the vesting of a prior estate unless there be a clear intention expressed to that effect. The ordinary intendment to be inferred from such limitations of estate after estate in succession, in the absence of any manifest purpose to the contrary, is "that they shall respectively take effect whenever the prior estates are out of the way, without reference to the manner in which they get out of the way." 2 Wills Exrs., 764.

By reference to the contents of the will, its particular intendment will be found, we think, in accordance with the general, instead of opposed to it. If any purpose is more plainly manifested by the testator than another, it is not to vest in any of his children an absolute estate, but to tie up the property at least during their lives and the lives of the grandchildren during minority. If we adopt the construction contended for in the answer of the defendants, that the ulterior bequests are dependent upon the happening of any of the contingencies upon which the estate is recast, it follows, if the contingency should not happen, the prior estate would necessarily be an absolute one, and this is an event which the testator seems particularly to have guarded against. Not one of the first takers, under any bequest in the will, takes (240) an absolute estate by express provision.

From a careful analysis of the clauses in question, we are of opinion, then, if the daughter Mary had survived and died unmarried, and, of course, childless, her estate would have been one only for life, and upon her death the executory bequests over of land and slaves to testator's heirs at law and next of kin, respectively, would have taken effect. No good reason can be given why the testator should desire to make a distinction between the cases of a child dying without having issue and

dying without marrying—why one should give life to the ulterior limitations and the other be the signal of their extinction.

As the law would have been in respect to the bequest to Mary Ann Simmons upon the supposition made, so it must be in a similar state of facts in respect to the estate of Benjamin F. Simmons. We are of opinion he took under the will of the father a life estate, subject to be enlarged as before stated, and upon his death unmarried the contingent bequest to the testator's *heirs at law* and *next of kin* took effect. This is the answer to the first point upon which the advice of the Court is sought.

The second point involves simply an interpretation of the words "next of kin" in the ulterior limitations to Mary Ann and Benjamin F. Simmons. This can hardly be considered an open question in this Court, for when the will was before the Court upon the former occasion it was decided that these words meant *nearest of kin,* and that there was no right of representation springing out of their use in this connection, as in the statute of distribution. The interpretation of these words has troubled the Courts not a little, but after some fluctuation and much doubt the ordinary grammatical sense has been adopted as the rule of construction unless it shall appear from the other parts of the instrument that a different meaning was intended. This is the sense, it is believed, which has been given to these words in every connection,
(241) save in the statute of distribution; as in the statute prescribing who shall be entitled to administration, *next of kin* has been, we think, uniformly held, both in this country and in England, to mean the *nearest in degree,* and to exclude persons who claimed in the next degree by representation.

In the case of *Simmons v. Gooding, supra,* the Court felt constrained by the weight of authority—and we now feel constrained by that and the force of our own decision—to hold the words *next of kin* in the will in question to mean the *nearest in degree,* and that the sister of the deceased brother Benjamin will take the slave property limited to him for life to the exclusion of the nephew and niece.

The able argument which has been addressed to us upon this point has caused us to consider it again more at large than we might otherwise have done, and we are again brought to the same conclusion. We do not feel at liberty to depart from the construction heretofore adopted—a construction, it may be added, which has the sanction of the most eminent Judges, Thurlow, Eldon, Grant, Plumber, and others. Those who are desirous of examining the authorities upon this vexed question will find them referred to in 2 Jarman on Wills, 38.

The construction which we thus put upon the will may disappoint the expectations of defendants' friends and work a case of hardship not

foreseen and not desired by the testator, but it cannot be otherwise without unsettling again the sense of words which it has given the Courts great trouble to fix and which the public interest now requires should remain so. *Misera est servitus ubi jus est, aut vagum, aut incognitum.*

The real estate limited to Benjamin for life will pass over to the heirs at law of the testator, who are the sister, Emily Harrison, and the two children of the deceased sister, Elizabeth Ward—Mrs. Harrison taking one moiety and the children, in the right of their mother, the other moiety.

PER CURIAM. Decree accordingly.

(242)

PENELOPE GUMS ET ALS. v. ALANSON CAPEHART.

1. Where one purchased slaves from a tenant for life, and sold them to a negro trader with a written stipulation to refund if they should be taken from him, provided he took them out of the State within ten days, it was *Held* that a purpose fraudulently to defeat the estate of the ulterior claimants was established.

2. The executor's assent to a legacy once given is effectual to vest the estate of the legatee, although such executor may die before proving the will or qualifying. This is the rule of the common law, and the legislation of this State has not changed it.

3. From a possession by a legatee for six years of the thing bequeathed, especially as against one purchasing from such legatee, the assent of the executor will be presumed, although after proving the will he died without qualifying or renouncing.

CAUSE removed from the Court of Equity of NORTHAMPTON.

Leah Gums, by her will executed in 1846, bequeathed several slaves, and among them Sarah, the mother of those in controversy, as mentioned below, to her nephew, William M. Gums, during his life, then to the plaintiff Penelope during her life or widowhood, and then to the next of kin of the said William M. Gums, to be equally divided between them. The will was proved by the subscribing witnesses at June Term, 1846, of the county court of Northampton, but the executor therein named neither qualified nor renounced, nor was there any administration with the will annexed. He is now dead. Shortly after the death of Leah Gums, the legatee was in possession of the said woman Sarah, with the other slaves mentioned in the will, and continued to hold them until 1852, when he sold them to the defendant Alanson Capehart, who kept them for a short time, and he then sold them to Alexander Nelson, a negro trader from a distant county of this State, and besides a bill of sale, which Nelson says is lost or destroyed, he executed the following paper-writing, which was delivered to the purchaser at the time of the

sale and was proved by Samuel Calvert to be all in the handwriting of Capehart, viz.:

"Received of Mr. Alexander Nelson & Co. eleven hundred and twenty-five dollars, in full for the purchase of four negro slaves, which
(243) money I hereby agree to refund should they be prevented from proceeding to Virginia with said slaves, on condition they are returned to me, unless they should be taken from said A. Nelson & Co. by process of law. The above obligation to be void in the course of ten days or more if they cannot sell them in so short a time.

"ALANSON CAPEHART."

The said Nelson proceeded unmolested to Richmond, in the State of Virginia, and there sold the slaves to a gentleman in Tennessee, and they have not been since heard of.

The bill charges that Capehart sold the slaves with an intent that they should be carried beyond the limits of the State for the purpose of defrauding the plaintiffs and defeating the estate to which they were entitled under the limitations of Leah Gums' will. William M. Gums died in 1854, and this bill was filed in June, 1855, in the name of his widow and children, and was originally brought against both Capehart and Nelson, charging a fraudulent combination, but it was subsequently dismissed as to the latter, and the prayer against the former is that an account be taken of the value of the slaves, and that the said Capehart pay the same into the office of the clerk and master to be invested for the use of the plaintiff Penelope during her life, and subsequently thereto that it be paid to her children according to the will of the testatrix. Capehart, in his answer, says that he only sold the interest of William M. Gums, and that Nelson agreed to take them on that condition. Nelson, whose answer was read in evidence, and whose deposition was taken, says that Capehart sold him the full estate in said negroes.

The cause was set down for hearing on the bill, answer, proof, and exhibits and sent to this Court.

Batchelor and Conigland for plaintiffs.
Barnes and Fowle for defendant.

PEARSON, C. J. We are satisfied by the pleadings and proofs, and particularly the exhibit annexed to the deposition of Samuel Cal-
(244) vert which is in the handwriting of the defendant Capehart and signed by him, and amounts in substance to a stipulation that the slaves shall be taken out of this State in ten days; that Capehart sold the slaves with an intent that they should be carried beyond the limits of the State for the purpose of defrauding the plaintiffs and defeating the estate to which they are entitled under the limitations in the will.

It was objected, on the argument here, that the plaintiffs could not have a decree because the assent of the executor was not established, and the objection was put on two grounds:

1. As the executor died without qualifying, he had no power to assent.

It is settled that at common law an executor may give his assent to a legacy, and if he dies before probate or before he qualifies, it is well enough, and such assent vests the property in the legatee. 3 Bacon's Abridg., 52; 1 Wms. on Exrs., 160. So the question is, Do our statutes change the law? We think they do not. By the Rev. Code, chap. 46, sec. 9, it is provided: "When any person shall die intestate, and his estate is in such a situation as to require immediate care, any three justices of the peace may grant special letters of administration"; and section 4 provides: "No person shall enter upon the administration of any deceased person's estate until he has obtained letters of administration, under a penalty of $100." These sections obviously apply to cases of intestacy, and leave executors at liberty to take care of the estate and do all such acts before probate and qualification as it was lawful for them to do at common law. Section 12 provides: "When a testator shall appoint any person *residing out of the State* executor of his will, the court shall require him to give bond and security; and until the executor shall enter into such bond, he shall have no authority to intermeddle with the estate"; thus, by implication, recognizing the common-law power of an executor who resides in the State. *Hairston v. Hairston,* 55 N. C., 123, was the case of a nonresident executor, and is put expressly on the ground that, by force of this section of the (245) statute, such an executor had no power to give his assent to a legacy as he had not executed the bond required.

2. The assent is not proved as a matter of fact.

There is no direct evidence of an assent; but it is admitted that the legatee, William M. Gums, in 1846, soon after the death of the testatrix, took the slaves into his possession and kept them as his property until 1852, when he sold them to the defendant Capehart, who kept them until he sold them to the other defendant. From this long possession, we are of opinion an assent ought to be presumed against one who purchased from the legatee—treating him as the legal owner, and who dealt with the property on the assumption that the title had vested by force of an assent, for although there is no estoppel, strictly speaking, still it comes with an ill grace from him to attempt to defeat the claim of the plaintiffs by insisting upon a want of evidence in respect to a fact which, in his "actings and doings," he has all along taken for granted.

The decree will require the defendant Capehart to pay into the office the sum of $1,125, the price at which he sold the slaves, with interest from 1854 (the date of the death of William M. Gums), to be invested

for the use of the plaintiff Penelope, who will be entitled to the interest accruing thereon during her life or widowhood, together with what has already accrued.

PER CURIAM. Decree accordingly.

(246)

HUGH CAMPBELL AND WIFE ET ALS. v. JOHN S. CAMPBELL AND WIFE ET ALS.

1. Under Rule 9 of the Chapter of Descents, chap. 38, Rev. Code, the naturalized children of a sister, herself alien born and not naturalized, and still alive, take the share their mother would have taken had she been naturalized or native born, which share must be equal to the shares of each of the mothers, brothers, and sisters.
2. And so of the children of a sister who is dead without having been naturalized.

APPEAL from the Court of Equity of GRANVILLE.

Robert Kyle died in the county of Granville, seized of real estate, without lineal descendants, leaving seven children and one grandchild of one brother, David, deceased, who are all plaintiffs; three children of one deceased sister, Jane Carr, also plaintiffs; two children and three grandchildren of another sister, Elizabeth Johnston, and three children of another sister, Mary Johnston. David Kyle and Jane Carr were duly naturalized, and died in the lifetime of Robert. Elizabeth Johnston was alien born and never was naturalized. She came to this country and resided until her death, which took place before that of Robert, but her children were naturalized and her grandchildren native born. Mary Johnston was alien born and never was naturalized; she is still alive, but nonresident. Her children reside in this State and have been duly naturalized.

This was a petition filed by the heirs of David Kyle and Jane Carr against the descendants of Elizabeth Johnston and Mary Johnston, praying for a sale of the land for partition, and insisting that the defendants are not entitled to a share in the land descended. The court below decreed a sale of the land and ordered a distribution of the proceeds according to the prayer of the petition—that is, among the lineal descendants of David Kyle and Jane Carr, to the exclusion of the children and grandchildren of Elizabeth Johnston and of the children of Mary Johnston. From this latter part of the decree defendants appealed to this Court.

Lanier for plaintiffs.
No counsel for defendants.

PEARSON, C. J. Robert Kyle died in 1857. So the question of (247) descent presented by the case depends upon the construction of Rule 9 as set out in Rev. Code, chap. 38, which is a modification of sec. 2, chap. 575, Laws 1801, which was reënacted by the Revised Statutes, and is Rule 9, chapter 38.

At common law, if an alien was naturalized and died, leaving a kinsman who was also naturalized or native born, such kinsman would inherit if near enough to take *immediately*, although there was a kinsman an alien, who would have excluded him but for that fact—in which respect an alien differs from one attainted. This distinction is put on the ground that the alien never was capable of taking by descent, whereas the person attainted was at one time capable. But if the citizen kinsman was not near enough to take immediately, and was forced to claim by *representation* through an alien, he could not inherit, for if the alien was living the right of representation did not apply; and if he was dead, representation would be of no avail as the party could only take that to which the ancestor, *if living*, would have been entitled. For instance:

1. One who has been naturalized dies, leaving his eldest son an alien and a younger son a citizen, the younger son will inherit because he takes immediately from his father.

2. Or, leaving a grandson a citizen, the child of a son who was an alien, the grandson cannot inherit for he cannot take immediately; and although his father be dead, representing him will be of no effect.

3. Or, leaving a brother a citizen, their father being an alien, the brother will inherit for he takes immediately from the deceased brother, and not by representing the father, as was held in *Collingwood v. Pace*, 1 Sid., 193; 1 Ventress, 413, in opposition to the opinion of Lord Coke. Co. Lit., 180 b., *id.*, 8 a.

4. Or, leaving a nephew a citizen, the son of an alien brother, the nephew cannot inherit, whether his father be dead or living, for he cannot take immediately, and representation would be of no (248) avail as his father was an alien.

The statute of 11 and 12 William III., chap. 6, was made to cure the disabilities in the second and fourth instances put above, and the like, by "enabling natural born subjects to inherit the estates of their ancestors, either lineal or collateral, notwithstanding their father or mother or other ancestor by, from, through, or under whom they might make or derive their title were aliens."

This statute, however, did not go so far as to enable a person to deduce title as heir from a remote ancestor through an alien ancestor still living. 2 Kent Com., 55.

The act of 1801 does not follow the statute of William III., but takes broad and independent ground, so as to make an heir, irrespective of the canons of descent, when necessary, to prevent an escheat. The preamble sets forth: "Whereas it is contrary to the true policy of this Government that lands should escheat to the State through failure of blood, when any relation of the ancestor exists who, in any case, might or in justice ought to inherit the estate," and it is enacted, section 1: "When any person shall die seized of real estate of inheritance, leaving no person who can claim as heir, but leaving a widow, the widow in such case shall be taken and held to be the heir of her husband, and inherit his estate as such." Thus making an heir in disregard of the principle which requires the heir to be of the blood of the first purchaser.

Section 2: "When any person shall die seized of real estate of inheritance, leaving descendants or other relations citizens of the United States who would, according to law, inherit were all other nearer descendants or relations extinct, but who, according to the now existing laws, cannot inherit because there may be others who, if citizens, would be entitled to inherit, but, being aliens, cannot hold land in this State, whereby such land would escheat, in such case the nearest descendant (this applies to the second instance put above) or relation (this applies to the fourth instance), being a citizen of the United States, shall in-
(249) herit." Thus *making an heir* out of a kinsman who is a citizen, in disregard of the principle of representation, and rendering a reference to alien kinsmen who are nearer in degree to the deceased ancestor necessary for the purpose only of counting the degree of relationship between the deceased ancestor and such of his citizen kinsmen as set up claim to the estate as heirs under the statute—in which point of view it is obviously immaterial whether the alien kinsmen be living or dead; indeed, the wording of the statute seems to apply only to the case of *nearer* alien kinsmen who are living, and its application to the case of alien kinsmen who are dead is left as a matter of necessary implication.

The act of 1801 was evidently not drawn by a lawyer. Its substance is that nearer alien kinsmen, whether living or dead, shall not exclude more remote citizen kinsmen from inheriting land as heirs of a deceased ancestor; being incapable of inheriting, they are not allowed to act "the dog in the manger," and thereby cause an escheat, which was considered to be against "justice" and "the true policy of our government." This construction is necessary in order to give any effect to the statute, for, taken literally, it only applies to relations who would inherit at common law, whereas the professed object is to let in citizens who would not inherit according to the rules of the common law, although the alien relations were out of the way by reason of the rule of representation; and

the obvious intention is carried into effect by giving to the statute the force of dispensing with that rule in favor of relations who are citizens, but who could not inherit if required to represent or make claim through or under their alien kin, whether dead or living.

In the case under consideration, as Robert Kyle left him surviving nephews and nieces, citizens, who are children of a deceased brother and sister, both of whom were naturalized, it might have been a question, inasmuch as these nephews and nieces are capable of inheriting according to the common law, so as to prevent any danger of an escheat, does the act of 1801 apply so as to bring in to divide the inherit- (250) ance with them the other nephews and nieces, who, although citizens, are the children of two alien sisters? We think, however, the question is met by the fact that the wording of the act is changed in the Revised Code, Rule 9 (Chapter of Descents), so as to drop the idea that the sole purpose was to prevent escheats, and put the rule on the broad ground that relations who are citizens shall be entitled to the land as heirs of the deceased ancestor, without reference to alien relations except for the purpose of ascertaining the degrees of relationship. It will be declared to be the opinion of the Court that the real estate mentioned in the pleadings should be divided into four parts and allotted among the petitioners and defendants *per stirpes,* and so much of the decree in the court below as is appealed from is reversed.

PER CURIAM. Decree below reversed in part.

NOTE BY THE CHIEF JUSTICE: After writing this opinion, I met with, by accident, the case of *Rutherford v. Wolfe,* 10 N. C., 272. It is in point, and sustains our construction: The grandfather and the father of the lessors of the plaintiff were both aliens and were both living. It was held that the lessors were the heirs of the grandfather's brother by force of the act of 1801. The objection mainly relied on was that the act of 1808 repealed the act of 1801. This is the only point noticed in the head-note, either in the index or in Iredell's Digest, which may account for the fact that the case had escaped the research of the very diligent and learned counsel who argued the question before us.

Cited: Harman v. Ferrall, 64 N. C., 476, 478.

(251)

HENRY L. WINTON v. WILLIAM L. FORT.

1. Matters of inducement to a contract not expressed as a condition and not forming a part of the essence of the contract are not allowed to defeat an estate or prevent it from vesting.

2. Where B., by parol contract, agreed to sell to A. a tract of land, and gave him possession and permitted him to make repairs and improvements, and afterwards, on B.'s repudiating the bargain and pleading the statute of frauds to a suit for a specific performance, it was *Held* in that suit that he should account to A. for the outlay in repairs and improvements.

CAUSE removed from the Court of Equity of WAKE.

This was a bill to compel the specific performance of a parol contract to convey the plaintiff 22 acres of land at $6 an acre. The plaintiff alleges that, expecting to keep a school on the land in question, he made the contract stated and, with the aid of the defendant, moved upon the premises and put large improvements on the same in building, repairs to building, clearing and fencing, and that the whole amount of these repairs was worth $800. The plaintiff alleges that he kept a school in the academy spoken of, and that four of the defendant's children came to his school; that the price of their tuition amounted to $120, and that it was understood and agreed between them that this tuition money was to go towards paying the price of the land; that when the contract was first made a surveyor was procured, who ran off the 22 acres agreed to be sold, and notes taken by him of this survey were left with the parties that a deed might be drawn between them, and that each paid half the expense of surveying.

The bill alleges that the defendant now refuses to perfect the contract so set out, and refuses to account to him for the improvements put on the land. The prayer is for a specific performance; and if the defendant relies upon the statute of frauds as a bar to this equity, he prays that the defendant may account to him for the expenditures and outlays in improving the premises, and for general relief.

The answer of the defendant admits that there was a parol contract between him and the plaintiff in respect to this land, but he says
(252) it was totally different in its terms and meaning from that set forth in the plaintiff's bill; that the real contract was that the "defendant agreed to sell him the piece of land at $6 an acre, provided, and upon condition, that he, the said Henry L. Winton and his wife, would, for a term of years, keep a good male and female school at the academy on my land"; that the said plaintiff had entirely failed to do so; that he had not paid him anything for the price of the land; that it is true he did send four children to school to the plaintiff for two sessions, but that the charge he was entitled to make therefor was less than $120, and that he had an account against the plaintiff for more than that sum for the hires of three slaves, and that the $20 alleged to have been paid towards the purchase money of the land was in fact paid towards these hires.

The defendant relied upon the statute of frauds, making void parol contracts for land. The proofs are sufficiently adverted to in the opinion of the Court.

Miller and Fowle for plaintiff.
G. W. Haywood for defendant.

PEARSON, C. J. As the contract was not reduced to writing, the plaintiff is not entitled to a specific performance; but as the repairs and improvements were made with the knowledge and concurrence of the defendant, he cannot in conscience take the benefit and refuse to make a proper allowance for the expenditure, unless the plaintiff has violated and refused to abide by and perform some essential part of the contract, and thereby put himself so far in default as justly to have incurred a forfeiture of his outlay.

To meet this equity, the defendant alleges that he agreed to sell the piece of land at $6 per acre, *"provided, and upon condition,"* that the plaintiff would, *for a term of years,* keep a good school at the academy, and that the plaintiff refused to teach after the first year.

Upon a careful examination of the evidence and a full consid- (253) eration of all the circumstances connected with the transaction, we are satisfied there was no such stipulation in the sense of a condition, either subsequent or precedent, so as to form a part of the essence of the contract.

We have no doubt that the defendant expected the plaintiff would continue to teach the school, and that was one of the inducements for selling to him, and we have as little doubt that the plaintiff expected to continue to teach, and that was one of his inducements for buying, but such matters of inducement are not allowed to have the effect of defeating an estate or of preventing it from vesting, and if such be the intention of the parties, if it should be expressed in the shape of a condition, either in the conveyance by which to defeat the estate or as a positive stipulation in default of which the contract to sell, is to be void and of no effect.

The estate was to be in fee simple, and the idea that, after taking effect, it was to be defeated by force of a condition subsequent is nowhere suggested. We think the suggestion that "teaching the school for a term of years" was a condition precedent, so that the defendant was not to execute a deed for the land, although the purchase money was fully paid, unless the school was taught for a term of years, finds as little to rest on, either in the evidence or in the nature of the subject-matter. There is no proof that the defendant agreed to take a cent less for the land in consequence of the understanding about the school. Soon after the contract a surveyor is procured, and the land is run off, and the notes of the surveyor retained by the parties for the purpose of having a deed drawn, and not a word is there said giving the slightest room for an inference that the deed was not to be executed upon the payment of the purchase money, but was to be held up until the school had been taught for a *term of years.* Surely had such a condition been agreed on it would have been put into a more certain and definite shape. How long

was the term of years to be? Upon what terms was the plaintiff to continue to teach? Such as the defendant might choose to dictate? (254) Or such as he was receiving for his first or trial year? Or such as the trustees of the academy might afterwards see proper to offer? In so grave a matter as a *condition* we ordinarily find all these things fixed as far as the parties can do so; and if other persons are concerned (like the trustees in this case), they are usually consulted. In short, the matter has not a single feature of a condition, but resembles in every respect a mutual expectation operating upon and treated by the parties as a mere inducement, which afterwards fails because the plaintiff is not able to come to a satisfactory arrangement as to his salary or the value of his services with the trustees, of whom the defendant is one, and thereupon they employ another person to take charge of the academy.

PER CURIAM. Decree for an account.

Cited: Barnes v. Brown, 71 N. C., 512; *McCracken v. McCracken,* 88 N. C., 285.

THE JUSTICES OF PITT COUNTY v. DABNEY COSBY.

1. Where it was alleged that one, without authority and against the wishes of the justices, in whom the title was vested, seized on a public square and was proceeding to build a house for a courthouse which would imperfectly answer the purpose, and that this trespass would produce an injury which would be *irreparable, or only to be repaired after great delay of time and at great expense,* it was *Held* not to be a proper case for the court to interfere by injunction to restrain the progress of the building.

2. Observations by *Battle, J.,* on the form of an affidavit to a bill made by an agent.

APPEAL from an interlocutory order of the Court of Equity of PITT dissolving an injunction; *Shepherd, J.*

The courthouse of Pitt having been destroyed by fire, the justices of the peace of the county, at ..... Term, 1858, of their county court, appointed a committee with authority to adopt a plan for a new courthouse and to contract with some person for building one. This (255) committee procured a plan to be drawn, with specifications, and the plaintiffs allege that defendant undertook and bound himself to execute the work according to said contract and specifications. The bill alleges that the defendant proposed certain modifications and alterations in the plan proposed, and they so far entertained these suggestions as to enter a memorandum thereof on the original plan, and these alterations were provisionally agreed to, but that about six months after-

wards, on seeing a draft of the building as proposed to be modified, they rejected the modifications proposed and notified the defendant that unless he gave bond and security to execute the work according to the original plan and specifications within three weeks "he would be considered as having forfeited all claims to the contract; and whatever contract, if any, had been entered into between the parties would be deemed rescinded." The bill alleges that the defendant paid no attention whatever to this notice, but took possession of a piece of ground in the town of Greenville belonging to the plaintiffs (a public square), and without consultation with the committee, and without ever having any place designated as the site of the new courthouse, proceeded with a large number of workmen to the erection of a large brick building, notwithstanding the committee, at the beginning of such erection, and repeatedly since, have requested him to desist. They allege that the building is not being done according to the contract, is of inferior materials, and will imperfectly answer the purposes of a courthouse, and "as a specimen of architecture will be unworthy of the county of Pitt, and if permitted to remain will encumber the public square." They allege that "this trespass by the defendant is greatly detrimental to the public interests and works an injury which is irreparable, or which can only be repaired after great delay of time and at great expense."

The bill prays for an injunction to restrain the defendant from proceeding with the building.

The affidavit annexed is as follows:

"G. B. Singletary maketh oath that he believes the facts set (256) forth in the foregoing bill are just and true."

On the coming of the defendant's answer, and on motion, the injunction (which had issued in vacation) was ordered to be dissolved, from which the plaintiffs appealed.

Rodman for plaintiffs.
McRae and Donnell for defendants.

BATTLE, J. There are one or two grounds upon which the order made in the court below to dissolve the injunction can be so clearly sustained that it is unnecessary to notice any other. The advocates for the injunction must base their claim to it upon the assumption, either that the building which the defendant is erecting is a nuisance, or that it is a trespass which will create an irreparable injury. If it be a nuisance, it must, of course, be a public one, and in that case the proceeding against it ought to be an information in the name of the Attorney-General or a bill to which he is made a party. Drewry on Injunctions, 240 (36 Law Lib., 165); 2 Stor. Eq., sec. 922 *et seq.*

If it be regarded as a trespass, then we cannot see how the injury can be deemed irreparable. The plaintiffs can very easily have the building taken down, and there is no intimation in the bill that the defendant will not be able to pay any damages which a jury may assess in an action at law. The plaintiffs could undoubtedly have brought an action of trespass *quare clausum fregit* the moment the defendant commenced digging up the soil for the purpose of laying the foundation of the building, and he could not have justified, unless he could show that he entered under a contract with the building committee, and, of course, with their license. Here, then, was a plain remedy which the plaintiffs had by an action of trespass at law, and it was also an adequate remedy, unless the damage can be shown to be irreparable. It is clear that it cannot be so deemed, either in a "technical" or any other sense. The principle upon which the injunctive process to restrain a trespass can be issued is said
(257) to be this: "That although the jurisdiction of equity does not properly extend to cases of trespass, strictly so called, yet where the trespass is of such a nature as to be actually taking away or destroying the very substance of the estate, as in the case of timber, coals, lead ore, there the injunction will be granted to restrain such species of trespass." See Drewry on Injunctions, 184 (36 Law Lib., 133), citing *Robinson v. Lord Byron,* 1 Bro. Ch. Cases, 588; *Harrison v. Gardner,* 1 Ves. Jr., 308; *Crockford v. Alexander,* 15 Ves., 138. The erection of a house upon the plaintiffs' land certainly does not fall within this principle. The bill does not state distinctly how far the defendant had progressed with the building complained of. If he has just commenced it, then it is manifest that the injury sustained can be easily redressed; but if it has been completed, or nearly so, the injury may be greater, provided the plaintiffs cannot make any use of the house; but the principle will be the same. Our opinion is that the plaintiffs have failed entirely to make out such a case of "irreparable injury" as to make it necessary for them to invoke the restraining process of a court of equity.

The decision of the cause upon its merits (so far as we are now at liberty to consider the merits) makes it unnecessary to notice with much particularity the objection of the defendant to the insufficiency of the affidavit annexed to the bill. We will only say at present that we do not approve of it, and we can see no reason why it should have varied from the usual form in such cases. When an oath is made by an agent for a corporation, it should state "that he has read the bill, or heard it read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on the information or belief of the complainants, and that as to those matters the deponent believes it to be true." *Bank v. Skinner,* 9 Paige Ch., 307.

PER CURIAM. The order appealed from is affirmed.

(258)

WILLIAM A. POSTON v. LUECO M. GILLESPIE ET ALS.

1. Where parties have bound themselves by a contract to marry, neither can give away his or her property without the consent of the other, and notice before the marriage of such a gift does not hinder the party injured from insisting on its validity.

2. Where a father, with whom his daughter resided and who was habitually under his influence and control, urged upon her two days before the time fixed upon by her for her marriage to sign a deed giving away her property, which she did with reluctance and with earnest protestations against the act, it was *Held* that such conveyance was inoperative and of no effect as against the husband.

THIS was a bill for an injunction and to set aside two deeds as being in fraud of the plaintiff's marriage sent from the Court of Equity of ROWAN.

The plaintiff was engaged in the service of the defendant E. D. Austin for the year 1850, living in his family, during which time an intimacy sprang up between him and Caroline Gillespie, a widow lady, the daughter of Colonel Austin, aged about 22 years, which resulted in an engagement to marry. This she made known to her father, but it was violently opposed by him. At first she concurred, or affected to concur, with the wishes of her father, and informed him that she had discarded the plaintiff, and that he would leave the country. On 1 March, 1851, however, she informed her father that she had determined to marry the plaintiff without his consent, and that the marriage was to take place in three days thereafter. He then called her attention to an agreement which had been made between them long before any marriage was in contemplation, which was, that if she ever married again, she would convey to her infant son, the defendant Lueco M. Gillespie, all her interest in the tract of land which her late husband had willed as a support for her and their child during her life; also a certain negro named Mary and certain articles of furniture, consisting of a bed and furniture, a bedstead, bureau and washstand, which said agreement was founded on the following consideration: It turned out that the property left by her former husband for that purpose had proved insufficient to pay (259) the debts of the estate, and one of the slaves bequeathed specifically to his wife and child would have to be sold to make up the deficiency. A negro man bequeathed to her infant son had no wife, and it was agreed between Mrs. Gillespie and her father that he should be taken, instead of falling on one of the two in which she had a life estate who had wives in the neighborhood; and as an equivalent therefor, conveyances should be made to secure the property above mentioned, to wit, her interest in the land, the girl Mary, and the furniture, to her said

son Lueco, and the slave of Lueco had accordingly been sold and the money applied in the payment of the debts. On this agreement and the facts connected with it being rehearsed to her, she made the conveyances accordingly. The defendant Austin says she did so willingly, and that when the one conveying the personal property was being prepared she insisted on putting in another slave named Vardry in which she had a life estate, which was done, and that she put in Vardry because she said Lueco's father ought to have given him to his son, and also insisted on putting in the articles of furniture above named, stating that she had bought them at the sale of her husband's estate for Lueco, and that she always intended to give them to him. He also says that she proposed to put in another slave, Linda, in whom she had a life estate, but he dissuaded her from doing so. The deed conveying her interest in the tract of land was made to E. D. Austin as the trustee and next friend of the said Lueco, and was dated 1 March, 1851; the other was made directly to her son Lueco, bearing the same date. On the next day after these deeds were executed, the father, Colonel Austin, started with his daughter to the State of Virginia, with a view, as he admits, to prevent the contemplated marriage from being solemnized. They proceeded to the house of a friend in the county of Davie, where they were detained by her indisposition, and during this delay the plaintiff came to that place and had an interview with the daughter. Colonel Austin then informed
him of the existence of the deeds in question, notwithstanding
(260) which they persisted in the purpose of marrying, which event
took place on 11 March, 1851, at the house of the defendant Austin, to which they returned after the interview above spoken of. The notice of the deeds was given to the plaintiff on 4 March.

Asbury McDaniel, a witness to the deed, states in his deposition that Mrs. Gillespie was constrained to sign the instruments in question; that she was in tears when she did it, and said she would rather go to her grave than do so; that her father used no force or threats, but told her to sign. There was testimony going to show that McDaniel's character was bad, and that he was not worthy of credit on oath. There was other evidence as to the question of duress.

The girl Mary and the articles of furniture remained in the possession of the plaintiff and his wife from their marriage till her death, which took place in the fall of 1853. In January, 1854, Colonel Austin took possession of the negro girl Mary as the property of his grandson, Lueco M. Gillespie, and suit was brought in the name of John F. Foard, as next friend of the said Lueco, in the Superior Court of Rowan, for the value of the bed, bedstead, and other personal property, and a judgment obtained against plaintiff for the same. The bill was filed against Colonel Austin, the trustee, the defendant L. M. Gillespie, and J. F.

Foard, his next friend in the suit at law, praying for an injunction to prevent the execution at law from being enforced, which was granted and was ordered to stand over and await the hearing in the cause. The further prayer is for the surrender of the two deeds as being a fraud upon the plaintiff's marital rights, and for the delivery of the girl Mary, and for an account of half the rents and profits of the tract of land given for the support of the said Caroline, plaintiff's wife, and her son during her life.

Fleming for plaintiff. (261)
Boyden and Jones for defendants.

PEARSON, C. J. The plaintiff and Mrs. Gillespie had entered into an agreement to marry, and the day for its solemnization was fixed. Three days before the time fixed for the wedding her father induces her to convey all of her property, except the negro woman, in whom she had but a life estate, to the defendant Lueco M. Gillespie, her infant son, who was before sufficiently provided for by his father's will. After procuring this conveyance, the father still determined to prevent the marriage if he could. He starts off with her to Virginia. In Davie County, at the house of a relative, she becomes too much indisposed to proceed on the journey. The plaintiff goes there and has an interview, and learns from her the fact that she had been induced to execute the conveyance of her property to her son. Both the plaintiff and Mrs. Gillespie still insist that the marriage should take place. Whereupon she goes back home with her father, and the marriage is solemnized shortly thereafter.

1 Roper Husband and Wife, 164, upon an examination of the cases, comes to this conclusion: "It is presumed, therefore, that *without the consent* of the intended husband, the law will not permit any disposition of the wife's property to be made before the marriage then in contemplation, and that under no circumstances after a treaty of marriage has commenced will any such voluntary disposition of her property be binding on her subsequent husband. In the absence of other evidence of fraud, the time when the disposition or settlement was made must decide its validity, and attention to this circumstance will, as it is presumed, reconcile the principal cases." This passage in Roper has been cited by this Court, with approbation, in several cases, but it was never before necessary to decide the precise point which is now presented—*i. e.,* does notice of the conveyance made by the wife, imparted to the husband at any time before the marriage is solemnized, defeat his right to have the conveyance set aside? Or is it necessary, in order to bind him, that, after receiving notice, he should concur and *give his consent* thereto, which is usually done by his signature on the conveyance?

(262) *Spencer v. Spencer,* 56 N. C., 404, after reciting the passage from Roper and making a reference to the other cases in which it is cited with approbation, is put on the ground that the notice is vague and indefinite. *Taylor v. Rickman,* 45 N. C., 278, where the husband actually signed the conveyance, is put on the ground of surprise because the paper was presented to him after the parties had met together for the purpose of being married.

The question depends on the time when the disposition or settlement is made, and the principle is this: if a woman, *before she has a marriage in contemplation,* gives away her property, the man who afterwards marries her has no ground of complaint on which he can stand before this Court, although he married expecting to get the property and without notice of the disposition previously made by her.

After the courtship has begun—that is, after the man has signified his intention to address the woman, and before the matter is concluded by her acceptance of the proposition—if she give away her property, and he has notice thereof and still proceeds in his courting, the disposition is binding upon him, although he did not concur and give his consent, because, at the time of his notice, he was not committed by a contract to marry, and his equity can only be put on the ground that he was *deceived,* which is repelled by the naked fact of notice, as in an action of deceit in the sale of a horse where it is proved that the vendee has notice of the defect before the trade was closed.

After the courtship or negotiation about and concerning the marriage is concluded, and the parties bind themselves by a contract to marry, neither can give away his or her property without the consent of the other, and the matter does not then rest upon a mere question of *deceit* which may be repelled by proof of notice, but involves a question of *fraud* on a right vested by force of a contract, for a breach of which an action will lie at law, although a court of equity will not enforce a specific performance for a reason growing out of its peculiar
(263) nature—*i. e.,* if the parties are unwilling, they cannot be forced to live together as man and wife should do; so a specific performance is impracticable, and the Court declines the jurisdiction on the same ground that it will not attempt to make parties proceed under a contract to carry on business as copartners in merchandise because, without mutual good-will and readiness on both sides, the object cannot be accomplished; still there is a valid contract embracing in its consequences the property of each of the parties, for, as is said in Roper, *supra,* 163, "the *wife's fortune,* in addition to his own, may be a weighty consideration and inducement for entering into the contract," and, of course, after the contract to marry is concluded she cannot convey her property without his concurrence; and if she does, the person taking it

with notice will be converted into a trustee in order to prevent a fraud on the contract.

In our case, the father of Mrs. Gillespie, at whose instance the conveyance was made, and who was acting as the self-constituted *prochien ami* of her infant son, had notice, and, indeed, procured her to make it for the express purpose of defeating the rights of the plaintiff vested by force of the contract to marry.

The ground mainly relied on by Mr. Boyden for the defendant, to wit, that the conveyance was for a valuable consideration, is not tenable for several reasons. We have seen that it was made with full notice of a preëxisting contract and with the purpose of defeating it. In respect to the several articles of furniture bought by Mrs. Gillespie, her saying "that she intended to give them to her son" amounts to nothing and has no legal effect. In respect to the land and slaves, the alleged arrangement not being in writing was not valid or obligatory in law or equity, and, at most, the amount of it was that her specific legacy should abate ratably with that of her son, and she was to make good by fair contribution any abatement of his legacy caused by the sale of a slave given to him instead of one given to her—taking into consideration the fact the legacy to him was contingent upon the event of his (264) arriving at the age of 21, with a limitation over to her if he died under that age, and the legacy to her was for life, with a limitation over to the son if he arrived at full age. So that this understanding can in no sense be treated as a valuable consideration to support the absolute conveyance which she was induced to make to her son on the eve of her expected marriage, and it must be treated as mere security for any balance which, upon a final settlement of the estate, may appear to be due by reason of a necessity for an abatement of the specific legacies, taking into consideration the value of the legacy to her and the legacy to her son under the will of the testator.

There is still another view on which the ground taken by Mr. Boyden is not tenable. We are satisfied by the evidence that Mrs. Gillespie did not execute the conveyance voluntarily and of her own accord. She did so under moral, if not physical, duress, and consequently the conveyance is inoperative and of no effect. The testimony of the subscribing witness establishes the actual constraint; and if it be said he is a man of notoriously bad character, the reply is that "he was selected by the father," so he cannot object on account of bad character, for if so, there is no proof of the execution of the deed, and there is room for the imputation that such a witness was selected because the father did not choose to have a credible witness who could speak of the constraint and duress imposed on his daughter. If to this be added the fact that the conveyance was executed at the instance of a father by a daughter whose

business he had charge of, who was living in his family and wholly dependent on him, and who having agreed to marry a man to whom her father had objections, was willing, in almost any way, to propitiate his favor, and the further fact that after all these concessions made by her and the deeds were signed according to his dictation, she is, on the next day—but two days before the day fixed on for her marriage—constrained by her father to start on a journey to Virginia, which purpose she defeated at the house of a relation by indisposition, either actual or
(265) feigned, whereby her intended husband is enable to overtake them, clearly makes out a case of duress.

The plaintiff is entitled to a decree setting aside the conveyances as in fraud of his contract to marry, except so far as to give them effect as a security for any abatement which, in a settlement of the estate, it may appear her legacy was liable to in order to meet her ratable part of the debts of the testator, which, although not relied on in the bill as a distinct ground for relief, is relevant in reply to the allegation that the conveyance was for valuable consideration.

PER CURIAM. Decree accordingly.

Cited: Ferebee v. Pritchard, 112 N. C., 86; *Brinkley v. Brinkley,* 128 N. C., 507, 509, 515; *Brinkley v. Spruill,* 130 N. C., 47.

BRYAN NEWKIRK ET ALS. v. ENOCH HAWES.

1. A testator bequeathed slaves to A. "during her life, and at her decease to the lawful heirs of her body, if any such there be, and if none, to return to the lawful heirs of my body," it was *Held,* that on the death of A. without having had a child, the limitation over was valid.

2. *Held, further,* that the children of the testator living at his death and the personal representatives of such as died after him were the proper parties to sue.

CAUSE removed from the Court of Equity of NEW HANOVER.

Abraham Newkirk, by his will executed in 1823, bequeathed as follows—that is to say: "I also lend unto my daughter Penny Newkirk, during her natural life, the following negroes, viz., Dolly and Dinah and Dinah's children, viz., John, Bill, Cæsar, Guilford, Peyton, and Sam; also one bed and furniture; and at her decease to the lawful heirs of her body, if any such there be; and if none, to return to the lawful heirs of my body, and to be equally divided amongst them."

The testator died in the same year, 1823, and his will was duly
(266) admitted to probate.

Penny Newkirk, the legatee above named, intermarried with the defendant Enoch Hawes some time in 1824, and the executor delivered to him all the slaves mentioned in the will. She died in 1859, without leaving any child or children, or the descendants of such, and without ever having had a child born alive. The bill is filed by the surviving children of Abraham Newkirk who were alive at the death of the testator and the representatives of such others as were then alive, but are now dead (excepting Penny, the legatee), to recover the said slaves and their increase, amounting in number to about twenty-three.

The defendant demurred to the bill generally for the want of equity. There was a joinder in demurrer and a removal of the cause to this Court.

W. A. Wright for plaintiffs.
Person, Strange, and Baker for defendant.

PEARSON, C. J. Is the limitation over to the heirs of the body of the testator valid, or is it too remote? Is it not necessary, in order to decide this question, to say whether Penny Newkirk took an estate for life, with a limitation to the heirs of her body *as purchasers* at her decease, or whether she took the entire estate under the rule in *Shelley's case,* defeasible at her death, to make room for the limitation over, for, in either view, as she never had a child, the property will pass under the limitation over, provided it be not too remote.

We think the limitation over is valid, because it is so limited that if it takes effect at all it must take effect at her death. The ownership of the property must at the time be absolutely determined one way or the other, consequently it was not "tied up" longer than the law allows. The very learned and able argument filed by Mr. Wright relieves the Court from the necessity of elaborating the subject. We adopt his reasoning to show that the time is fixed, and the limitation over depends upon her having heirs of her body at her decease. "The force of the words *at her decease* pervades the whole clause and manifestly (267) qualifies both of the limitations. *To the lawful heirs of her body, if any such there be.* When? Clearly *at her decease.* And if none such there be. When? Equally clearly *at her decease.*" That is, "To the lawful heirs of her body, if any such there be, at her decease; and if none, to return to the lawful heirs of my body."

Of the many authorities cited by him, *Baker v. Pender,* 50 N. C., 351, is enough to dispose of the question. It is there said: "We are satisfied that the words *at her decease* fix the happening of that event as the time at which the limitation over must take effect, if it takes effect at all, and consequently that it is not too remote. *At* is a more precise

word of time than *after,* and it is settled that *after* her death is sufficient to restrict the limitation."

We at first inclined to the opinion that the objection for misjoinder of parties in respect to the personal representatives of the four sons who died after the testator was well taken; but upon reflection, we are satisfied that it is untenable, and that at the death of the testator all his children had such an interest under the limitation over as would devolve upon their personal representatives. A contingent remainder, or any such contingent interest in land, is transmissible by descent, and in personalty devolves upon the personal representative *when the person is certain* and the uncertainty rests upon some collateral event. Where the *person is uncertain* there cannot, as a matter of course, be a descent or devolution. See Fearne; Roper on Leg., 402; 1 Jarman on Wills, 177. The question is narrowed to this: Were the persons to the limitation over is given certain? *Nemo est hares viventis.* But as the limitation is to the heirs of the body of the testator, he was dead when it took effect, and so the maxim has no application. Heirs of the body include children and the issue or descendants of any child who is dead. *Thompson v. Mitchell,* 49 N. C., 441. In our case, as all of the children were living at the death of the testator, they were heirs of his body, and their identity was fixed with as much certainty as if each child had
(268) been named—Penny, the daughter to whom the property is given in the first instance, being excepted by necessary implication because of the primary gift to her.

If the limitation over had been "to the heirs of my body *then living,*" there would have been uncertainty in respect *to the persons,* and the descendants of a child dying after the testator would have answered the description at the happening of the event and become entitled to the share of their parent if living would have taken, to the exclusion of the personal representatives; but the limitation over is not thus restricted. The persons to whom it is given were certain at the death of the testator, and the uncertainty rested upon a collateral *event* irrespective of their being alive when the event happened, consequently the interest of the sons who died devolved on their personal representatives. *Sanderlin v. Deford,* 47 N. C., 74.

PER CURIAM. Let the demurrer be overruled and a decree be entered declaring the opinion of the Court as to the construction of the will and requiring the defendant to answer.

Cited: Newman v. Miller, 52 N. C., 519; *Blake v. Page,* 60 N. C., 253; *Mayhew v. Davidson,* 62 N. C., 49; *Conigland v. Smith,* 79 N. C., 304; *Hooker v. Montague,* 123 N. C., 158.

JAMES BRANCH v. JOHN BRANCH ET ALS.

Upon a bequest to children as tenants in common, with a postponement of the division, in the absence of any direction to the contrary, the expenses for maintenance and education of each is a separate charge upon his share of the profits.

CAUSE removed from the Court of Equity of HALIFAX.

The bill was filed against the defendant, as the guardian of the plaintiff, for an account and settlement of the amount arising to him under the will of his father, Joseph Branch. The clauses of the will material to the question debated before the court are as follows: (269)

"Item. I authorize and request my executors hereinafter named to sell, on such terms as they may think most proper, all my lands in the State of Tennessee and all my personal property, with the exception of my negroes and five trunks and their contents, which I wish reserved for the use of my children.

"Item. I desire that my negroes be hired out yearly, in the county of Williamson, until the arrival of my sons, respectively, to the age of 21 years or the marriage of my daughter.

"Item. I give, devise, and bequeath unto all my children an equal portion of my estate, to be paid over to them as they respectively arrive at the age of 21 years; but should my daughter marry before arrival at the age of 21, I desire that her portion be paid over to her upon her marriage. . . .

"Item. I desire that my children be carried back to North Carolina and placed under the care of my brother John Branch. . . . I should prefer, under my present views, that all my children shall be raised and educated in North Carolina, but as events may occur which I cannot foresee, I leave this entirely to the discretion of their guardians hereinafter named.

"I desire that such of my negroes as may be necessary to wait on and attend to my children go with them to North Carolina. I greatly desire that my negroes shall be humanely treated, and should prefer, if it can be done, that they be hired out privately to humane persons, even at a less price, and, if possible, in families together."

Appoints John Branch, Laurence O'Brian, and Henry R. W. Hill guardians, trustees, and executors. The will was made in Tennessee. The children came back to North Carolina, and were reared and educated under the supervision of Governor Branch, the defendant.

The only question argued in this Court was whether, according to the provisions of the foregoing will, the maintenance and education of the children is to be a joint charge upon the aggregate profits (270) of the estate, or whether the support of each is to come off of his separate share of the profits only.

Cause set for hearing on the bill, answer, exhibits, and proofs sent to this Court.

B. F. Moore and Rodman for plaintiff.
Badger, Miller, and Batchelor for defendants.

MANLY, J. A simple inquiry is made of the Court upon the construction of the will of Joseph Branch, viz., whether the maintenance and education of the children is to be a joint charge upon the aggregate profits of the estate, or whether the support of each is to be taxed against his aliquot part of the profits only.

There is nothing, it seems to us, in the will to justify the first view. It is well settled in respect to bequests of this sort to *children* that they take vested interests with a right to the profits down to the period fixed for enjoyment for support, and upon a plain principle of justice each would be entitled to the profits in proportion to his interest in the property. A different application of the profits can only be justified by a manifest purpose on the part of the testator. It is sufficient for the occasion to say no such purpose is perceivable. Equality seems to be a leading characteristic of the testator's bequests. This excellent feature would be marred by regarding the profits as a joint fund, subject to the general charge, and divisible as the children respectively arrive at age. Perfect equality could only be attained in one of two ways, either by postponing the division until the youngest arrived at age, and then making a general division, which is not allowed by the terms of the will, or by regarding the profits from the beginning as divisible among the children according to their respective interests, which is allowed and which we deem the proper interpretation.

We have attentively considered the will and are of opinion that by postponing the period of division it was not the purpose of the
(271) testator to disturb the equal interests of his children, but to secure, as far as practicable, the comfort and happiness of his slaves, to increase the general profits, and consequently to augment the value of each share in it, and to provide more conveniently for the application of the profits to the wants of each. If no intention to the contrary were clearly manifest, we should feel bound to follow the general rules of law by which the profits attend on the shares and the charges attach on the profits.

These views and conclusions are fully sanctioned by the cases of *Green v. Cook,* 17 N. C., 531, and *McLin v. Smith,* 37 N. C., 371, in the first of which, especially, the same question is made under precisely similar circumstances.

In all the cases cited by the defendant's counsel, there was a joint fund provided for the maintenance of the children, which distinguishes them from this case.

PER CURIAM. There must be a decree for an account conformably to this opinion.

D. B. Wood ET ALS v. SAMUEL REEVES, EXECUTOR OF WILLIAM S. MACAY.

Where a female infant's land was sold under a decree in equity for the benefit of the infant, and she married and died in 1850, before coming of age, leaving a child, who died in 1851, in infancy, its father surviving, it was *Held* that the money retained the character of real property, and that the heirs at law of the last mentioned infant had an equity to follow the fund and recover it from the executor of its father, into whose hands it had come as administrator of his wife.

CAUSE removed from the Court of Equity of ROWAN.

The plaintiffs in this suit are the heirs at law of ..... Macay, an infant child of William S. and Margaret I. Macay, who died before it was named. Isabella, the mother of Margaret Macay, and (272) grandmother of the said infant, was the wife of Richard Lowery. She died seized of a tract of land in the county of Rowan, and, at her death, it descended to her daughter, Margaret I., then under age. At September Term, 1838, of Rowan County Court, Richard Lowery filed a petition for the sale of this land, in his own name, as tenant by the courtesy and as the guardian of his daughter Margaret, and obtained a decree for the same. Upon the sale of the land the purchase money ($756.66) was paid by the clerk and master to Richard Lowery, who executed a bond for the payment of the money to his daughter Margaret when his life interest therein should terminate. Lowery kept this money until his death, which occurred in 1854. In the meantime Margaret I., his daughter, had intermarried with William S. Macay, the defendant Reeves' testator, and died under 21. Her child, the said infant, survived her but a short time. After the death of Richard Lowery the administrator of Mrs. Macay brought suit upon the bond against the administrator of Lowery, and recovered the money, and paid it to William S. Macay, who retained the same until his death in 1856. This suit is brought by the heirs at law of the said infant against the executor of William S. Macay to recover this money.

The defendant demurred, and the cause was removed to this Court by consent.

Fleming for plaintiff.
Boyden for defendant.

BATTLE, J. *Bateman v. Latham,* 56 N. C., 35, is a direct authority in favor of the claim of the plaintiffs. The fund received by the defendant's testator, though retaining the character of real estate so far as its devolution and transfer are concerned, nevertheless went into his hands in the form of money, and as such passed into the hands of the
(273) defendant as his executor. The right of the plaintiffs to follow the fund necessarily requires that they should be allowed to recover it from him or them who, at the time, may have it in possession, and in the present case that is the executor, and not the heirs at law of William S. Macay.

PER CURIAM. Demurrer overruled.

Cited: Whitley v. Foy, 59 N. C., 37; *Grier v. McAfee,* 82 N. C., 192.

THEODORE F. KEEHLN AND WIFE, EXECUTORS, v. FRANCIS FRIES ET ALS.

Where a pecuniary or general legacy is given, but not payable until the legatee attains the age of 21, with a bequest over divesting the legacy in case he dies under age, the personal representative will take the accumulated interest.

CAUSE removed from the Court of Equity of FORSYTH.

Antionette L. Breittz died in the county of Forsyth, having made a last will and testament, which was admitted to probate, and C. D. Keehln, the executor therein named, qualified as such. C. D. Keehln afterwards died, leaving a last will and testament, which was also admitted to probate, and Theodore F. Keehln and wife, the executors therein named, qualified according to law and undertook the execution of the wills of both Antionette Breittz and C. D. Keehln.

This bill is filed for a construction of certain clauses of the will of Antionette Breittz set out below:

The second clause of this will is as follows: "It is my will and desire that my sister, L. F. Bagge, after my decease, take my daughter, Sarah E. Breittz, entirely under her care and charge; and it is further my will that my said sister, L. F. Bagge, receive out of my estate the sum of $150 each and every year until my said child Sarah shall have
(274) attained the age of 10 years, and after the expiration of said ten years the sum of $300 for the extra use and benefit of my said daughter, Sarah E. Breittz."

7. "I give and bequeath unto my daughter, Sarah E. Breittz, all my books, piano, secretary, all my clothes, etc., forever; but my sister, L. F. Bagge, to take all under her care until my said daughter, Sarah E. Breittz, either make use of it, or when she becomes of age; should, how-

ever, my said daughter, Sarah E. Breittz, depart her life before she arrives at the age of 21 years, then the property mentioned in this paragraph, together with all the property, moneys, notes, land, or whatever it may be that may have come from me to my said daughter, Sarah E. Breittz, is to go to the children of my said sister, Rebecca M., intermarried with Henry A. Shultz, share and share alike."

10. "My will and desire is that all the residue of my estate, after taking out the devisees and legacies above mentioned, to be paid over to my daughter. Sarah E. Breittz, and her heirs forever."

The will appointed C. D. Keehln guardian of Sarah E. Breittz, which office he discharged up to his death. The said Sarah E. Breittz, the daughter and legatee, died under 21, and the defendant Francis Fries was appointed her administrator, against whom, and the three children of Mrs. Shultz, this bill is filed. The only point upon which it prays the instruction of the Court is whether the rents and profits which accumulated between the death of the testatrix and that of her daughter, Sarah E. Breittz, goes to the ulterior legatees, or to the administrator of the said Sarah.

Wharton for plaintiff.
Moore,, Masten, Fowle, and T. J. Wilson for defendant.

MANLY, J. As children are supposed to be the peculiar objects of a parent's care, constructions most favorable to their rights have been generally adopted by the courts.

We accordingly find that a pecuniary legacy to a *child* does not (275) stand in all respects upon the same footing with one to a person not in that relation. As a general rule, when a day of payment is fixed for a legacy interest will not be counted upon it until the day arrives, but it is not *generally so* in respect to a child's legacy, because, as it is said, of the child's necessity in the meantime for support. So when a general legacy is left to a child in such a way as to vest, but upon a *condition subsequent,* as upon dying before obtaining the age of 21, it is to divest and go over, the child will be entitled to the interests or profits for support; and if he die, the accumulation will go to his personal representative. This general rule is supported by many legal authorities, and is only departed from, as we think, when a different *intention* is manifest in the provisions of the will, as when complete provision for support is otherwise made and a purpose declared to leave the interest to accumulate and go over, upon the happening of the condition, to the ulterior legatee. *Hearle v. Greenbank,* 3 Atkins, 697, which was cited on the argument, is a case that falls under the exception above stated. The general rule was there admitted to be that such legacies bore interest.

The governing principle in construing every testamentary paper is to discover and carry into execution the testator's purposes. Rules by which we are guided in the interpretation of language have this end in view and are made subservient to it. It seems to us, upon a consideration of all parts of the will having relation to the matter in controversy, that the testatrix intended the donation in the second clause of her will in aid only of the other fund for education and support. The language used, *"for the extra use and benefit"* of her daughter, does not exclude, but rather suggests, the idea of other means of support. There is no part of the will which favors a different conclusion or indicates an intention to tie up the accumulation of this estate during the minority of the daughter, and that they should go to her only in case she obtained the age of 21. The fund is given to her in the tenth clause in language sufficient and proper to convey a vested interest; and the provision in the seventh clause, by the construction most unfavor-
(276) able to the rights of the legatee, *postpones* merely the possession until the age of 21. It follows, from this view of the will, that the interest and profits of the entire estate of Sarah E. Breittz vested absolutely in her were, during her lifetime, subject to her education and support, and upon her death, under age, passed to her personal representative. The conclusion to which we thus come is fortified by a number of analogous cases, which seem to establish the rule of interpretation "that wherever a pecuniary or general legacy is given out, not payable until the legatee attain the age of 21, with a bequest over, divesting the legacy in case he die under age, the personal representative will take the accumulated interest." *Acherly v. Wheeler,* 1 P. Williams, 783; *Nichols v. Osborne,* 2 P. Williams, 419; *Barber v. Barber,* 14 Eng Con. Chan., 388.

We are of opinion, therefore, that the personal representative of Sarah E. Breittz will take the interest, dividends, and profits accumulated upon her estate from the death of the testatrix to the time of the said Sarah's death, subject to a due course of administration, and that the capital only will pass to the children of Rebecca M. Shultz.

PER CURIAM. Decree for an account.

HARRISON PARKER ET ALS. v. RICHARD M. JONES ET ALS.

1. If an execution has been satisfied by a levy on property of the defendant, the court issuing the execution, upon a writ of *audita querela,* will order it to be called in and satisfaction entered of record, so that equity has no jurisdiction to interfere to stop a second satisfaction of the same execution.

2. The levying of an execution on property which is redelivered to the defendant in the execution on his giving a forthcoming bond is not a satisfaction of the execution.

CAUSE removed from the Court of Equity of ORANGE. (277)

A judgment was rendered at the Superior Court of Orange, at September Term, 1858, for about $1,000, in favor of the administrators of B. L. Durham, against John A. McMannen, who was principal, and plaintiffs Parker, Lockhart, and one C. T. McMannen as sureties, and execution was taken out thereon and put into the hands of the defendant Jones, who is the sheriff of Orange County. This execution was levied on the land owned by J. A. McMannen, being all he owned. Jones had various other executions in his hands issued from Orange County Court of prior test, which were levied on certain personal property, sufficient, as plaintiffs allege, to have satisfied them. This property thus levied on went back into the hands of the debtor on his giving a bond with security for its delivery on the day of sale. Shortly after this the property mentioned was levied on by a constable under judgments and executions in his hands issued by justices of the peace, and the whole of it sold and applied to the satisfaction of these magistrates' judgments. In consequence of this levy and sale by the constable, the sheriff levied these executions of older test on the same land that the Durham execution had been levied on, and on its being sold he applied the proceeds to the others, to the exclusion of the Durham execution (except a small sum). The bill is filed by Parker and Lockhart, two of the sureties in the Durham judgment, against Jones, the sheriff and the administrators of Durham, alleging a combination between Jones the sheriff, McMannen the principal debtor, and one E. G. Mangum, the plaintiff in the constable's executions, to wrest the personal property from the satisfaction of the county court judgments, for which it was abundantly sufficient in value, and to turn them on this property, to which alone the plaintiff could look for the satisfaction of the judgment for which they are liable, as the said J. A. McMannen has become totally insolvent; that the sheriff willfully and negligently forebore to take the said personal property again in execution, but voluntarily abandoned it to the satisfaction of the constable's levies. The plaintiffs insist that the levy of these county court executions on the personal property was a satisfaction of them in law, and that the levy of the execution on (278) which they are sureties of the land was a satisfaction of it, and that the plaintiffs in that judgment and execution have no right to make satisfaction a second time out of them. The prayer is for an injunction to restrain the plaintiffs in the Durham judgment and the sheriff from taking out execution thereon against them or levying the same on their property. An injunction was issued in vacation. At the return term

the defendants, the administrators of Durham, demurred to the bill for want of equity as to them, and Jones, the sheriff, answered. A motion was thereupon made to dissolve the injunction, which was refused, and the defendants appealed to this Court.

Graham for plaintiffs.
Phillips and Norwood for defendants.

PEARSON, C. J. The bill discloses no equity against the defendants Stagg and Davis, the administrators of the creditor. He did no wrong, and it is not charged that he in any way induced or concurred in the supposed misconduct of the defendant Jones, as sheriff, or was connected with the supposed fraudulent combination between Jones and the other defendants. On the contrary, he was the party directly injured by it, and was thereby delayed in the collection of his debt, and it would be strange if that could be made a ground for enjoining his personal representative from proceeding in the exercise of their legal right to make the money due upon the judgment.

The position assumed is, that by reason of the "actings and doings" of Jones, the sheriff, the judgment in question was, in legal contemplation, satisfied. Admit, for the sake of argument, that to be true, the plaintiff has a clear legal remedy, for, upon a writ of *audita querela,* the Court, where the judgment remains, will order "satisfaction" to be entered upon the record and call in the execution if one has issued; so there is no equity involved and nothing to require the interference of this Court.

(279) But waiving that question, do the matters of fact alleged have the legal effect of a satisfaction? The sheriff, having in his hands prior executions in favor of other creditors, had levied on personal property of the principal debtor of value sufficient for their discharge and permitted the debtor to take the property back into his possession upon his giving a forthcoming bond, and the property is levied upon and sold under executions in the hands of a constable. The execution issuing on the judgment in question, together with the prior executions, are levied on land of the debtor, which is sold by the sheriff, and nearly all the money raised by the sale is applied by the sheriff to the satisfaction of the prior executions and but a small amount is applied to the execution on the judgment in question.

If the sheriff had enforced the forthcoming bond, and by means thereof made the money to satisfy the prior executions, then he could have satisfied the judgment in question out of the money raised by the sale of the land; but for some cause with which the creditor has no connection, he failed to do so, and thereby but a small sum was applicable to the judgment, and, of course, it remains unsatisfied.

If a sheriff levies upon personal property, the title is thereby vested in him and the execution is satisfied, *unless* the property gets back into the possession of the debtor or is otherwise applied to his use. *Collins v. Bank*, 17 N. C., 525. In this case, the property did get back into the possession of the debtor, and was applied to his own use in the discharge of the executions in the hands of the constable, and, besides, the execution on the judgment in question never was levied on the personal property; so the gravamen of the plaintiff is that the sheriff did not enforce the forthcoming bond, and thereby make room for the payment of the judgment out of the money raised by the sale of the land. In this complaint against the sheriff the creditor concurs with them, being himself the party directly injured. How, then, can this omission, malfeasance, or misconduct of the sheriff give to them an equity (280) against his administrators?

Without reference to the answer of the defendant Jones, or the explanation given by him, we are of opinion that the injunction ought to have been dissolved on the motion of the administrators for the want of equity against them, and the order continuing the injunction until the hearing must be reversed and the injunction dissolved.

Whether the plaintiffs can have any relief against the sheriff, or whether, by arranging the debt and taking an assignment from the administrators, they can subject him at law or can work out an equity through the creditors in the prior execution, so as to have relief on the forthcoming bond, are questions into which we will not enter.

PER CURIAM. Decretal order reversed.

Cited: Partin v. Lutterloh, 59 N. C., 344; *Hamilton v. Mooney*, 84 N. C., 14.

FRANCES A. GRAVES ET ALS. v. THOMAS W. GRAVES, EXECUTOR.

1. Where a testator gave to his wife the share she would take in a case of intestacy, and gave the residue to his children, and directed that his whole estate should be subject to the support of his family and education of his children, and provided that the education of his children should be under the direction of their mother, and that as the children should become of age or marry, the executor should allot a share to each, it was *Held* to be the intention of the testator that the whole estate should go into the hands of his wife for the support of his wife and children, and that the executor's sole duty was to make the allotment as the children might arrive at age or marry.

2. Where a testator directed that his widow and children should remain together as a family, she keeping the whole estate for the support of the family and education of the children, with directions that each child should have a share on arriving at age or marrying, and the arrangement was de-

feated by the necessity of selling the homestead for the payment of debts, it was *Held* that the share of the children became immediately payable to their guardians.

3. One per cent was *held* to be a sufficient commission to an executor on money received by him from a clerk and master arising on the sale of land.

4. Where the money of an estate was collected and paid out mostly in large sums without must litigation, it was *Held* that 3 per cent on the receipts and disbursements was a sufficient compensation to an executor.

(281) CAUSE removed from the Court of Equity of CASWELL.

The bill was filed by the widow and children of James L. Graves against the defendant, his executor, for an account and payment of the legacies given by the will. Mr. Donoho was appointed a commissioner to audit the account, who made two reports—the first stating a balance in the hands of the executor, and stating, also, that a suit was pending against the estate in the court of equity of Caswell County, and that a final report could not be made until that suit was determined. Subsequently he reported, as the result of that suit, a decree for $3,655 against the estate in the hands of the defendant, which the commissioner allows in the account as a credit to the defendant. The plaintiffs except to the commissions allowed by the commissioner to the defendant. It appears that 4½ per cent had been fixed as the rate to be allowed by an order of the county court, and the commissioner adopts that allowance. The whole amount of receipts was about $18,000; of this $6,858 was money paid over to him by the clerk and master in equity on the sale of land and $450 on the sale of slaves. The greater part of the sums received were paid out by the executor, most of it in a few large debts. The plaintiffs except to the rate as being too high, and especially that allowed on the money received from the master in equity. To the second report they except on the ground that the commissioner has credited the defendant with the recovery in the court of equity without it being alleged or proved that the executor has paid the amount.

The answer of the defendant sets forth as a reason why he should not pay the share of the children the following provisions of the testa-

(282) tor's will:

"Item. I give and devise to my wife, Frances A. Graves, such portion of my estate, real and personal, as she would be entitled to in case of my intestacy.

"Item. I give and devise the residue of my estate and property of every sort to my children. . . .

"Item. My will is that my whole estate shall be subject to the support and maintenance of my wife and children and the education of my children during the widowhood of my wife, unless, in the meantime, my children shall arrive at age or marry, in either of which events I direct

a division shall be made and the portion of such child as may arrive at age or marry shall be allotted to such child by my executor.

"Item. I will and direct that my children shall be educated under the direction of their mother."

It was insisted in the answer that it was the intention of the testator that the executor should retain the possession of the property, rent out the land, hire out the slaves from year to year for the benefit of the children, and on their arrival at age or marrying, allot to each a share. The cause was set for hearing upon the bill, answer, and upon the exceptions to the report and sent to this Court.

Bailey and Norwood for plaintiffs.
Kerr for defendant.

PEARSON, C. J. There is nothing in the will to justify the construction that the executor was to retain possession of the property and rent the land, hire out the negroes from year to year for the benefit of the children, so as to answer the purpose of or be a substitute for a testamentary guardian. He has a mere power to allot to the children as they respectively arrive at age or marry, the portion to which they may be entitled.

The testator gives his wife such portion of the real and personal estate as she would have been entitled to in case of his intestacy; but it is clear from the whole scope of the will that he did not ex- (283) pect her to have it separated from the rest of his estate, except in the event of her marrying again, and his intention and wish was that the whole estate should go into the hands of his wife, to be managed by her for the support and maintenance of herself and children and for their education, which is to be under the direction of "their mother," with whom he expected they would make their home until they respectively married or arrived at age, in which event the executor was to see that a proper share was allotted to each.

Subsequent events, however, made it impossible to carry this wish of the testator into effect. The debts turned out to be more than he expected, so as to make it expedient to sell the land. The wife had her share of the proceeds of the sale in lieu of her dower, and it appears by the answer she has had her portion of the slaves allotted to her; and as "the whole estate" cannot now be kept together as a home for herself and the children, the residue of the estate to which they are entitled must be paid over to the guardian who may be appointed for them and be subject to his possession and management, and not that of the executor, because no such power is conferred on him.

The exceptions to the first report, on the ground that the commissions allowed are excessive, are sustained. Upon the amount of $6,858, cash

paid to him by the clerk and master as the proceeds of the sale of land made by the clerk and master, who, we are to presume, was allowed for selling, taking notes, making title, and collecting, and the amount of $450 cash paid in the same way as proceeds of an interest in slaves sold by the clerk and master, 4½ per cent is certainly too high. We think 1 per cent is enough for merely receiving the money.

There seems to have been very few debts due to the estate, and of the debs due by the testator the larger amount were in two debts—$3,000 to bank at Raleigh, $4,000 to Graves, guardian—and there seems to have been little or no litigation in settling the claims of or against the testator; besides, the bulk of the receipts was for the sale of slaves, (284) and a few items run up a large figure. Upon the whole, we think 3 per cent on the receipts and disbursements a proper allowance and 1 per cent on the amount received from the clerk and master. We have the less reluctance in differing with the commissioner in respect to the commissions allowed, because he informs us that he did not act so much on his own judgment as upon that of the county court, whose estimate he adopted.

The second, or supplemental, report must be set aside on the ground that the judgment recovered against the executor cannot be passed as a *voucher* until it is paid or so arranged as to discharge the estate of the testator from all further liability.

PER CURIAM. Recommitted.

Cited: Carr v. Askew, 94 N. C., 210.

ELIZABETH GILMORE, BY HER COMMITTEE, WILLIAM J. SLOAN, v. G. B. GILMORE, HASTEN GILMORE ET ALS.

1. Where a wife filed a petition for a divorce and alimony, it was *Held* that a court of equity would not, in favor of such wife, restrain an assignee from reducing into possession a chose in action of the wife, assigned him by the husband for value, and without notice of an equity in the wife.

2. Where a husband assigned a chose in action of the wife for value and without notice of an equity in the wife, and the assignee commenced a suit in a court of competent jurisdiction to reduce it into possession, and got a decree for the same, it was *Held* that the filing of a petition for divorce and alimony by the wife did not constitute such a *lis pendens* as would restrain the assignee from proceeding to reduce it into possession.

APPEAL from an interlocutory order of the Court of Equity of CHATHAM, at Fall Term, 1858; *Dick, J.*

Elizabeth Gilmore filed a petition for a divorce in the court of equity for Chatham, at Spring Term, 1858, alleging that she was the wife of

Greenberry Gilmore, by whom she had four children; that her (285) husband had so mistreated her as to bring on insanity, and that in May, 1857, he left the State clandestinely with a young woman and went to Texas, where he was living in adultery with her; that at May Term, 1858, of Chatham County Court, an inquisition of lunacy was had, by which the petitioner Elizabeth was declared *non compos mentis,* and the petitioner William J. Sloan was appointed committee of her estate.

The petition further alleges that in April, 1855, William Patteshall, of Chatham County, the father of the petitioner Elizabeth, died, leaving an estate in which her distributive share is about $1,000; that this estate is still in the hands of the administrators Delilah Patteshall and Zachariah Patteshall; that previous to his absconding, her husband assigned his interest in this distributive share to the defendant Hasten Gilmore for the sum of $700; that petitioner believed this sale was a sham intended to defraud her of her rights, and that no consideration passed from the said Hasten to the said Greenberry, but such sham was intended to enable Hasten Gilmore to transmit said distributive share to Greenberry Gilmore in Texas, to which he was then meditating a flight; that Hasten Gilmore, with this view, has filed a petition in the county court of Chatham, claiming the aforesaid distributive share; that there has been an account rendered, and there is danger that the said Hasten may succeed in his design. The petition then prays a writ of injunction to restrain the administrators from praying over and the said Hasten from receiving petitioner's distributive share in the estate.

The answer sets out that on 3 January, 1856, Greenberry Gilmore assigned his interest in the estate of William Patteshall to the defendant, and for value and without notice of the petitioner's equity; that at August Term, 1857, of Chatham County Court the defendant Hasten Gilmore, as assignee of the interest of Greenberry Gilmore, in right of his wife in the estate of William Patteshall, filed a petition for a settlement and obtained a final decree, in which the distributive share above mentioned was decreed to him, amounting to about $820 (286) after paying costs of suit; that the assignment was in all respects *bona fide* and with no intent on the part of the defendant to defraud any one, and the charges of the petition that it was only a pretended sale are entirely without foundation; that Greenberry Gilmore urged him for some time to purchase his interest in the estate, which he finally did, paying him $700 for the same, in money and good notes, and without any notice that his right would be disputed; that the estate was unsettled at the time, and the exact amount of a distributive share could not be ascertained with certainty, but, as it afterwards appeared, the price paid for it, with the interest on the same from the date of the assignment, amounted to within a few dollars of the full amount of a dis-

tributive share. The answer further states that in March, 1857, Greenberry Gilmore executed a release to the administrators of William Patteshall of all his interest in right of his wife in the estate of their intestate, stating that he assigned all his said interest to the defendant Hasten Gilmore; that the administrators paid him $125 on this assignment, and in the receipts which they took from him recognized him as being entitled under the assignment to a distributive share of the estate.

Upon the filing of the answer, the injunction which had been previously granted was dissolved. From this order the petitioner appealed to this Court.

Headen, Phillips, and Haughton for petitioner.
Badger and Moore for defendant.

BATTLE, J. We have given to the interesting questions presented by the pleadings in this case much consideration, and in doing so we have been aided by very able and elaborate arguments from the counsel on both sides. We have examined with minute attention all the positions taken by the counsel by the plaintiff, and have at last been unable to discover any principle upon which we can give her the relief
(287) which she seeks without violating some well-recognized rule of law or equity.

The counsel for the plaintiff takes as the basis of his argument the principle decided by this Court in *Arrington v. Yarborough,* 54 N. C., 72, that the wife is entitled by a survivorship to her equitable choses in action as against a *bona fide* assignee for value, if the husband die before the assignee can reduce them into possession. The spirit of this principle, the counsel contends, will extend to and embrace every case of a dissolution of a marriage, whether it be by divorce or death, and whether the divorce be *a vinculo matrimonii* or *mensa et thoro.* That may be admitted, and yet it will not, of itself, aid the plaintiff, because the court of equity will not stay the hand of the husband or assignee from reducing the chose in action into possession, if he can, before the death of the husband. To do so would be reviving the exploded doctrine of an equity for a settlement and establishing it in a condition more objectionable than that in which it formerly existed.

The counsel, then, is driven to the necessity of contending further, that by the filing of the plaintiff's bill, a *lis* was constituted in court, and that during the *lis pendens* the Court would arrest the chose in action of the wife and keep it in the condition in which the suit found it for the purpose of making it amenable to whatever decree the plaintiff might finally obtain. That argument would perhaps be irresistible if the defendant had not purchased *bona fide* and for value what the

husband had the right to assign, and without any notice of any cause for which the plaintiff had the right to file her bill, and had himself brought suit in a court of competent jurisdiction for the recovery of the claim and obtained a decree therefor just at the time when the bill was served upon him. These facts are stated in the defendant's answer and must be taken as true as the case now stands, which is upon a motion to dissolve the injunction. It cannot be that the *lis pendens* of the plaintiff can have the effect to arrest a prior *lis pendens* of the defendant proceed, indeed, in another court, but according to the same (288) "rules of practice prescribed for and used in courts of equity." See Rev. Code, chap. 64, sec. 7. We have seen that the wife cannot enjoin the collection of her choses in action so as to prevent an assignee from collecting them before the death of her husband, and thereby giving her a chance to survive him. Can she do so with a view to get a decree for a divorce, and thereby secure for herself her choses in action in derogation of the rights of the assignee? Very certainly she cannot, unless there is some provision to that effect in the act concerning "Divorce and Alimony," Revised Code, chap. 39. The only section of that act which seems to bear upon the question is the eighth, which provides: "In all cases where there shall be a sufficient cause for a divorce (absolute or from bed and board), with alimony, the wife may exhibit her petition or libel at any time, in case her husband is then removing or is about to remove his effects from the State, if she will likewise state and swear that she doth verily believe that she is entitled to alimony, and that by delaying her suit she will be disappointed of the same by the removal of her husband's property and effects out of the State. And in such cases, any judge may thereupon make an order of sequestration or otherwise, as the purposes of justice may seem to require."

We do not think that this section can admit of a construction to aid the plaintiff. It is the "husband's effects" and the "husband's property," the removal of which is to be restrained by a writ of sequestration. What constitutes the husband's property and effects which are to be thus restrained? Certainly not what he had sold *bona fide* and for value to one who bought without any notice of the wife's ground of complaint and before it in fact existed. An article of property, the legal title of which had been thus bargained and sold would clearly not come within the meaning of the act as being still the husband's property. Nor, we think, would an equitable chose in action, of which the title had been completely transferred in equity by an assignment and a notice thereof to the trustee. See Adams Eq., 53. Such seems to (289) have been the nature of the transfer in the case now before us. The husband made the assignment to the defendant, of which the administrators of the plaintiff's father had due notice and recognized the

defendant as the owner. Under these circumstances, we think the court of equity had no power to restrain the defendant from receiving and the administrator from paying over to him the distributive share in controversy.

As we hold the injunction was rightly dissolved upon the filing of the answer, for the reasons which we have expressed, we deem it unnecessary to consider the objections urged by the defendant's counsel, that the plaintiff being a lunatic is incapable of maintaining a suit for either kind of divorce, because she cannot make the affidavit which is required of her by section 5 of the act. That is a question which arises more properly between the plaintiff and her husband, and may possibly come before us hereafter. The case is now here only on an appeal from an interlocutory order, and as we have said enough to dispose of that it may be premature, and is certainly unnecessary, for us to express an opinion upon any other matter which the cause may present.

PER CURIAM. Decretal order affirmed.

Cited: Daniel v. Hodges, 87 N. C., 101.

(290)

W. G. CURTIS, RECEIVER, v. THOMAS C. MCILHENNY.

Where a bond, payable to a testator, was, by an order of the court of equity, taken out of the hands of the executor and committed to a receiver for collection, it was *Held* not to be a ground for suing in a court of equity that the defendants were setting up acceptances made by them of bills drawn by the executor as payments to the executor by agreement with him, since the question can be fully tried in a court of law.

Cause removed from the Court of Equity of BRUNSWICK.

On 1 January, 1855, Thomas C. McIlhenny, with E. B. Dudley and Thomas Cowan as sureties, executed a bond in favor of S. B. Everett for $5,000, for value received, payable to the said Everett, with interest from date. Everett died in 1855, leaving a last will and testament, with Samuel Langdon executor of the same. Some time during 1858 Langdon was removed from the office of executor of the will of S. B. Everett, and the plaintiff Curtis, clerk and master of the county of Brunswick, appointed receiver of the estate. Curtis applied to McIlhenny and his sureties to have this bond satisfied, which they refused to do, alleging that a large portion of it had been paid off by accepting bills drawn on said McIlhenny by Langdon whilst acting as executor and accepted by McIlhenny in consideration of the bond aforesaid. In reference to the bills of exchange, the bill states that Langdon, after entering upon the execution of the will, employed one B. D. Worrell to build a house for

the benefit of the estate; that in so doing he transcended the limits of the power conferred on him by the will and greatly impaired the estate; that in payment for this work the executor Langdon drew a bill of exchange on McIlhenny in favor of B. D. Worrell for more than $800, with an understanding between the said Langdon and McIlhenny that the payment of the bills should be a payment on the bond. There were other bills of exchange drawn by Langdon in favor of one L. P. Ivey upon defendant McIlhenny, and accepted by him, with a like understanding between them as to the bond.

When Curtis was appointed receiver he gave notice to McIl- (291) henny not to pay the bond to Langdon, and not to pay any order that he had made or might make. The defendant McIlhenny did not pay the orders, but contends that the acceptance of them is a payment to that amount. The bill prays a decree for the payment of the whole amount of the bond. Defendant demurred.

E. G. Haywood for plaintiff.
No counsel for defendant.

BATTLE, J. We are unable to discover any principle upon which the bill can be sustained. The plaintiff, as receiver of the estate of S. B. Everett, deceased, has a right under the order of the court of equity, by which he was appointed, to sue at law in the name of the executor upon the bond mentioned in the pleadings (3 Dan. Ch. Prac., 1991); and if the bills of exchange drawn by the executor and accepted by the principal obligor are not payments, he will, of course, recover the whole amount of the principal and interest of the bond without any deduction; but if those bills of exchange are legal payments, as from *Ligon v. Dunn,* 28 N. C., 133, it seems they are, then the plaintiff certainly cannot at law recover the amounts of them again; nor can we conceive any good reason why he should be allowed to recover them in equity. No collusion is alleged to have existed between the debtor and the executor for the purpose of defrauding the estate of the testator, and it is a new idea that the debtor should be compelled to pay his debt a second time because the executor has either wasted or misapplied the money collected on the debt. The demurrer must be sustained.

PER CURIAM. Bill dismissed.

(292)
HAYNES W. SHELTON ET ALS. v. ELIZABETH J. SHELTON ET AL.

At common law, it was not necessary that a trust should be declared in any particular mode. In England the statute of frauds requires that declarations of trust shall be *manifested and proved* by some writing, but in our State there is no such statutory requirement; and so the matter stands as at the common law. Where, therefore, one bought and paid for a tract of land and caused the title to be made to A., declaring at the time, by parol, a trust for B. and others, it was *Held* that such trust would be enforced in equity.

CAUSE removed from the Court of Equity of DAVIE.

Mrs. Mary Morgan, in 1833, bought from one Andrew Hunt, and paid for, one-half of a tract of land, and had the same conveyed to Vincent M. Shelton, who was the oldest son of her daughter Elizabeth Shelton, the wife of Henry R. Shelton, an insolvent man, all whose property had been sold from him under executions. But the legal estate was conveyed to the said Vincent M. Shelton, subject to a trust declared by the said Mary Morgan in favor of Elizabeth Shelton for her life, remainder to all the children of the said Elizabeth Shelton.

The object of Mrs. Morgan was to secure a home for her daughter, Mrs. Shelton, and her children; and accordingly, the said Elizabeth, with her family of children, from the time of the said purchase until her death, which took place in 1844, lived upon and cultivated exclusively the premises in question, and no claim to the exclusive enjoyment of the same was set up by Vincent Shelton in his lifetime. He died in 1846; and after his death, the guardian of his children, the defendants, took exclusive possession. The bill is brought by the other heirs at law of Mrs. Shelton against the children of Vincent M. Shelton to have a trust declared for all the children of Mrs. Shelton.

The cause was heard upon the bill, answer, exhibits, and proofs.

(293) *Clement for plaintiffs.*
Boyden for defendants.

PEARSON, C. J. The pleadings and proofs establish these facts: Mrs. Morgan, wishing to provide a home for her daughter, Mrs. Shelton, and her children (the son-in-law having failed and been sold out), purchased a tract of land, paid the price, and had the deed made to Vincent Shelton, who was then the only son of Mrs. Shelton then of full age, with a verbal declaration of trust that he was to hold for his mother during her life and in remainder in fee for all of her children; and Mrs. Shelton and her family lived on the land for many years afterwards without paying rent or any claim being set up on the part of Vincent.

The question is, are these trusts valid, or is there an implied trust for Mrs. Morgan, treating the declaration of trusts as of no effect? Or can the heirs of Vincent Shelton hold the land exclusively for their own use?

At common law, it was not necessary that a trust should be declared in any particular way; the declaration could be made by deed or by writing not under seal or by mere word of mouth. In either case, if the trust could be proved, the chancellor enforced its execution.

If a feoffment be made upon a consideration paid by the feoffee, he holds to his own use because of the price paid. If a feoffment be without consideration, the feoffee holds for the use of the feoffor upon an implied use unless there be an express declaration of the use which would repel the implication. So if one buys land, pays the purchase money, and directs the title to be made to a third person, there is an implied trust in favor of the purchaser, because of the price paid, unless the implication is repelled by proof of a contrary intention, as where the person to whom the title is passed is a child, or by an express declaration of the trust in favor of others. In England, by a section of the statute of frauds, all declarations of trusts are required to be "manifested and proved" by some writing, signed by the party, with a proviso that "trusts by implication or construction of law shall be (294) of the like force and effect as the same would have been if this statute had not been made," thus leaving trusts implied from the payment of the purchase money to depend on the proof of the intention, as at common law, as between the purchaser and the person to whom the title is passed. "The evidence which is thus brought forward, on either side, may be derived from contemporaneous declarations or other direct proof of intention, or from the circumstances under which the transaction took place, or from the subsequent mode of treating the estate and the length of time during which a particular mode of dealing with it has been adopted on all sides." Adams Eq., 35.

In this State, there is no statute which requires the declaration of a trust to be in writing, and the matter stands as at common law. It follows that the declaration of trust made by Mrs. Morgan at the time she bought the land in favor of Mrs. Shelton and her children is valid—not simply for the purpose of repelling the implication of a trust in favor of Mrs. Morgan and of disproving an intention that the trust was to be exclusively for Vincent Shelton and his heirs, but for the purpose of establishing a trust in favor of Mrs. Shelton and *all* of her children, according to the declaration, the execution of which will be enforced by this Court.

It was suggested on the argument that a declaration of trust falls within the operation of the act of 1819, Rev. Code, chap. 50, sec. 11:

"All contracts to sell or convey land, or any interest in or concerning land, shall be in writing." The construction of this statute is fully discussed in *Hargrave v. King,* 40 N. C., 430; *Cloninger v. Summit,* 55 N. C., 513. A bare perusal of the statute will suffice to show that it cannot by any rule of construction be made to include a declaration of trusts, so as to supply the place of the section of the English statute of frauds in regard to a parol declaration of trusts, which our Legislature has omitted to reënact.

It was also suggested that a verbal declaration of trust cannot be proved without violating the rule of evidence: "A written instru-
(295) ment shall not be altered, added to, or explained by parol." The reply is, if this position be true, the English statute in respect to the declaration of trusts was uncalled for, and the doctrine of verbal declaration of trusts would not have obtained at common law. The truth is, neither the declaration nor the implication of a trust has ever been considered as affected by that rule of evidence. The deed has its full force and effect in passing the absolute title *at law,* and is not altered, added to, or explained by the trust, which is an incident attached to it, in equity, as affecting the conscience of the party who holds the legal title. Herein a trust differs from a condition, by which the estate is defeated *at law* upon the payment of money, for the condition affects the *legal estate,* and to give it force must be *added to* and constitute a part of the deed. It follows that the class of cases in which it is held that a deed, absolute on its face, may be converted into a security for money by *adding* a condition that the legal estate is to be void, so as to make it a mortgage, upon proof of declarations and *matter dehors* inconsistent with the idea of an absolute purchase, has no bearing on the question of a declaration of trust. In our case, however, there is this "fact *dehors*" that Mrs. Shelton went into possession and lived with her family on the land for many years without paying rent, and the delay before commencing this suit is accounted for by the fact that a former suit was brought, which, after pending several years, was dismissed without prejudice.

PER CURIAM. Decree for the plaintiffs.

Cited: Riggs v. Swann, 59 N. C., 120; *Whitfield v. Cates, id.,* 139; *Frey v. Ramsour,* 66 N. C., 469; *Shields v. Whitaker,* 82 N. C., 520; *Holmes v. Holmes,* 86 N. C., 208; *Holden v. Strickland,* 116 N. C., 191; *Cobb v. Edwards,* 117 N. C., 246; *Gorrell v. Alspaugh,* 120 N. C., 367, 374; *Sherrod v. Dixon, id.,* 63; *Bank v. Fries,* 121 N. C., 243; *Hughes v. Pritchard,* 122 N. C., 61; *Owens v. Williams,* 130 N. C., 168; *Sykes v. Boone,* 132 N. C., 203; *Avery v. Stewart,* 136 N. C., 431; *Lehew v. Hewett,* 138 N. C., 11; *Gaylord v. Gaylord,* 150 N. C., 227, 236; *Ander-*

son v. Harrington, 163 N. C., 142; *Jones v. Jones,* 164 N. C., 322; *Lutz v. Hoyle,* 167 N. C., 634.

Dist.: Ferguson v. Haas, 64 N. C., 776.

(296)

MEMORANDA.

Since last term, HON. THOMAS RUFFIN resigned his seat as a Judge of this Court, and HON. MATTHIAS E. MANLY was appointed by the Governor and Council in his place.

GEORGE HOWARD, ESQ., of Wilson, was appointed by the Governor and Council Judge of the Superior Courts in the place of JUDGE MANLY, appointed on Supreme Court.

JAMES W. OSBORNE, ESQ., of Charlotte, was appointed by the Governor and Council Judge of the Superior Courts in the place of HON. DAVID F. CALDWELL, resigned.

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JUNE TERM, 1860

(AT RALEIGH)

FREDERICK W. SWANN ET ALS. v. FRANCES M. SWANN ET AL.

1. A testator may, if he choose, exempt an undisposed of residue from the payment of his debts by throwing that burden on other property specifically willed for that purpose; but in order to do this, his intention must be very clearly manifested.
2. The general rule is that intestate property is primarily liable for the payment of debts, even though other property may have been directed by will to be sold for that purpose.

APPEAL from an interlocutory order made by *Heath, J.*, at last Spring Term of BRUNSWICK.

John Swann, of Brunswick, bequeathed, in the second clause of his will, as follows:

(298) "I desire and direct that my plantation and land in Brunswick County, and also my cattle and live stock upon my said plantation, . . . and also my negroes Robert, a cooper, and Hannah shall be sold by my executor, . . . and the proceeds applied, first, to the payment of my debts."

Clause 8th. "I direct that after the payment of my debts out of the proceeds of the sales directed in the second clause, my executor shall invest $400 in the purchase of a maidservant for my daughter Fanny."

He then proceeds, in the ninth clause, to direct the application of $400 more of the proceeds of the sale, *after payment of his debts,* to be invested in like manner for another daughter; and in the tenth clause, he gives to each of four grandchildren a thousand dollars out of the residue of this fund; and then, *after the payment of the debts and the said several legacies,* he gives the residue of the said fund to his widow, Frances Swann, who is made one of the defendants in the bill. He also gives to his widow certain lands and a plantation in the counties of Moore and Harnett, and the stock, farming tools, etc., belonging to them, and also gives her other personal property.

It turned out that a large crop of rice was on hand at testator's death which was undisposed of by his will, which the defendant Davis, who administered with the will annexed, sold for $4,800, and this bill is filed by the plaintiffs as next of kin against both the widow and the